

| REPORT DOCUMENTATION PAGE | | | | Form Approved OMB No. 0704-0188 | |
|---|-----------------------------|-----------------------------------|---|--|---|
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| 1. REPORT DATE (DD-MM-YYYY) 12-06-2009 | | 2. REPORT TYPE Master's Thesis | | 3. DATES COVERED (From - To) 21-07-2008 to 12-06-2009 | |
| 4. TITLE AND SUBTITLE RULE OF LAW IN AFGHANISTAN - TIME FOR A NEW APPROACH? | | | | 5a. CONTRACT NUMBER | |
| | | | | 5b. GRANT NUMBER | |
| | | | | 5c. PROGRAM ELEMENT NUMBER | |
| 6. AUTHOR(S) Lt Col Sean M Burke MBE UK ARMY | | | | 5d. PROJECT NUMBER | |
| | | | | 5e. TASK NUMBER | |
| | | | | 5f. WORK UNIT NUMBER | |
| 7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Joint Forces Staff College Joint Advanced Warfighting School 7800 Hampton Blvd. Norfolk, VA 23511-1702 | | | | 8. PERFORMING ORGANIZATION REPORT NUMBER JFSC 25789 | |
| 9. SPONSORING / MONITORING AGENCY NAME(S) AND ADDRESS(ES) | | | | 10. SPONSOR/MONITOR'S ACRONYM(S) | |
| | | | | 11. SPONSOR/MONITOR'S REPORT NUMBER(S) | |
| 12. DISTRIBUTION / AVAILABILITY STATEMENT Approved for public release, distribution is unlimited | | | | | |
| 13. SUPPLEMENTARY NOTES | | | | | |
| 14. ABSTRACT The thesis of this paper is that current Rule of Law initiatives in Afghanistan are fractured and ineffective; a comprehensive program of new initiatives is required to craft and deliver sustainable reform. This paper argues that organizational self-interest, the absence of unity of effort, and most importantly the failure of Western nations to accept unity of command have all retarded progress on Rule of Law. The lack of advancement across all Rule of Law sectors is primarily a result of Western indecision, conflicting strategies and parochial national agendas. The subsequent problems facing donor nations, organizations and coalition partners has stemmed from a lack of consensus in strategic direction. International approaches continue to differ even amongst the closest of allies, particularly in regards to strategy and additionally in operational direction in the CN sector. Debate continues over the strategic way forward in areas of strategic leadership, International or Afghan primacy, and "top-down" or "bottom-up" reform. Conflicting strategic thought exacerbates debate over policy and focus of effort, in particular whether efforts should be directed on short-term or long-term initiatives. Additional differences exist over a need to focus on training the military or the police and whether to implement a troop surge or a political, diplomatic and information surge. The paper argues that conflicting policy initiatives, failures of national and international programs, corruption, ineptness and failures in both military and International strategies have led to a failed Rule of Law program. The paper concludes that it is time for a new approach for Rule of Law within Afghanistan. It recommends the establishment and acceptance of a single overarching body and individual to take responsibility for the Rule of Law strategy. It recommends an Afghan authority to co-ordinate the various competing and conflicting organizational approaches, and it identifies a range of proposals required for Rule of Law success in post conflict Afghanistan. Without new initiatives, major progress will not be achieved in establishing a new approach for Rule of Law in Afghanistan in the near future. | | | | | |
| 15. SUBJECT TERMS AFGHANISTAN RULE OF LAW | | | | | |
| 16. SECURITY CLASSIFICATION OF: | | | 17. LIMITATION OF ABSTRACT Unclassified Unlimited | 18. NUMBER OF PAGES | 19a. NAME OF RESPONSIBLE PERSON Ms. Stacey Newman |
| a. REPORT Unclassified | b. ABSTRACT Unclassified | c. THIS PAGE Unclassified | | | 19b. TELEPHONE NUMBER (include area code) 757-443-6301 |

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Rule of Law in Afghanistan – Time for a New Approach?

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A paper submitted to the Faculty of the Joint Advanced Warfighting School in partial satisfaction of the requirements of a Master of Science Degree in Joint Campaign Planning and Strategy.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Joint Forces Staff College or the Department of Defence.

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17 March 2009

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ABSTRACT

“A society where the rule of law is absent will inevitably be prone to conflict and will lack the enabling environment that is a prerequisite for sustainable development and poverty eradication.”¹

The Rule of Law is a widely used term. In a strict legal sense it is the fundamental doctrine that all men are equal in the eyes of the law and there is no arbitrary application of that law. The concept was popularized by AV Dicey, in the *Law of the Constitution* 1885. In the security sector the term is now more encompassing. It

Governs the relationship between institutions in a State, and between those institutions and the citizen. It enables individuals to hold their State to account for respecting their human rights..., helps to manage disputes between individuals..., [and] provides a predictable business and economic environment that helps protect property and livelihoods, so contributing to sustainable development.²

In this paper, the Rule of Law incorporates police reform, access to justice, national oversight mechanisms, counter-narcotics (CN), legal and justice capacity-building, correction facilities and reform of the security services. In all cases, progress has been slow, lack of parallelism, contradictory and lacking in strategic fit. An accepted norm within the security sector movement is that the first step in post conflict reconstruction is establishment of Rule of Law. Within Afghanistan this has not been achieved. The multitude of international initiatives introduced to re-establish the Rule of Law within Afghanistan after the US-led invasion in 2001, have not delivered the progress expected or envisaged. The failure to recognise this principle in Afghanistan has resulted in limited

¹Strengthening the Rule of Law in Conflict and Post-Conflict Situations. A Global UNDP Program for Justice and Security. UNDP Executive Board Statement Page 2. 2008-2011
http://www.undp.org/cpr/documents/Rule_of_law_global_programme_final.pdf (accessed November 11 2008)

²Stabilisation Issues Note. Security Sector and Rule of Law UK Department for International Development. Page 2. <http://www.stabilisationunit.gov.uk/resources/securitysectorlaw.pdf> (accessed March 13 2009)

success after seven years of international effort and investment. The lack of international and national strategic alignment in both post-conflict Rule of Law planning and post-conflict Security Sector Reform (SSR) activity has failed the Afghan Government and its people.

The thesis of this paper is that current Rule of Law initiatives in Afghanistan are fractured and ineffective; a comprehensive program of new initiatives is required to craft and deliver sustainable reform. This paper argues that organizational self-interest, the absence of unity of effort, and most importantly the failure of Western nations to accept unity of command have all retarded progress on Rule of Law. The lack of advancement across all Rule of Law sectors is primarily a result of Western indecision, conflicting strategies and parochial national agendas. The subsequent problems facing donor nations, organisations and coalition partners has stemmed from a lack of consensus in strategic direction. International approaches continue to differ even amongst the closest of allies, particularly in regards to strategy and additionally in operational direction in the CN sector. Debate continues over the strategic way forward in areas of strategic leadership, International or Afghan primacy, and “top-down” or “bottom-up” reform. Conflicting strategic thought exacerbates debate over policy and focus of effort, in particular whether efforts should be directed on short-term or long-term initiatives. Additional differences exist over a need to focus on training the military or the police and whether to implement a troop surge or a political, diplomatic and information surge. Coalition and NATO disagreement continues as to the requirement for a single overall commander as in Malaya, or multiple organizational structures and commands as exists in Afghanistan

today. Inter-agency co-operation, unity of military command and unity of action remain further areas of international disagreement.

A requirement for improvement in all sectors of Rule of Law is identified with additional focus required specifically in police reform and CN activities. Police reform is identified as central to achieve progress in the security and stability of the country. The Afghan National Police (ANP) still lack civilian oversight. The ANP requires substantial improvements in its capacity and capability. It is still unable to take the lead in dealing with the fundamental underlying security issue within Afghanistan – the criminal growing, processing, distribution and export of opium and, more recently cannabis.

The paper identifies a wide range of initiatives required to resolve the current situation within the Rule of Law components in Afghanistan. It argues that conflicting policy initiatives, failures of national and international programs, corruption, ineptness and failures in both military and International strategies have led to a failed Rule of Law program.

The paper concludes that it is now time for a new approach for Rule of Law within Afghanistan. It recommends the establishment and acceptance of a single overarching body and individual to take responsibility for the Rule of Law strategy. It recommends an Afghan authority to co-ordinate the various competing and conflicting organizational approaches, and it identifies a range of proposals required for Rule of Law success in post conflict Afghanistan. Strategic focus groups have been established by US Secretary of Defense Robert M. Gates to consider new strategic approaches. There has been increased attention from the EU and additional recent recognition from NATO nations that increased effort is required to resolve the problems in Afghanistan. The paper suggests a

wide range of initiatives that individually and collectively will promote improved Rule of Law in Afghanistan. These initiatives should link diplomatic, information, military, economic and geographic efforts into a coherent inter-agency and international strategic approach. Without such a strategy to establish and maintain unity of effort, major progress will not be achieved in establishing a new approach for Rule of Law in Afghanistan in the near future.

ACKNOWLEDGEMENT

I have been indebted in the preparation of this thesis to my supervisor, Dr Vardell Nesmith, whose advice and guidance, as well as his academic experience, has been invaluable to me. Thanks also must go to Lt Col Tracey Hayes USAF for her invaluable and time-saving assistance in formatting this document.

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Chapter I. INTRODUCTION

This paper analyses the range of Rule of Law challenges currently being addressed within SSR across Afghanistan. The term includes police reform, access to justice, national oversight mechanisms, CN, legal and justice capacity-building, correction facilities and reform of the security services. The term Rule of Law in this context is the broadly understood term as used in the Security Sector Management School of study and practice. It is not limited to the more generally understood focus on access to justice and application of constitutional law. This paper will initially establish the background to existing initiatives, programs and strategies. It will analyze current initiatives and strategies and consider a range of conflicting strategic options. The paper concludes by identifying the requirement for a new approach for “Rule of Law” in Afghanistan and outlines a broad range of recommendations. The thesis of this paper is that current Rule of Law initiatives in Afghanistan are fractured and ineffective; a comprehensive program of new initiatives is required to craft and deliver sustainable reform.

This thesis consists of five chapters. Chapter Two starts with a background on Rule of Law initiatives undertaken after the US-led invasion on October 7, 2001. Furthermore, it outlines a number of key theoretical definitions of Rule of Law. A single, all-encompassing definition incorporating all sub-component elements of Rule of Law does not exist.

Chapter Three explores the current situation within Afghanistan and devotes considerable analysis to the Rule of Law component sectors in an attempt to ensure understanding of the current complex and inter-connected challenging conditions facing

both the Afghan Government and the International Community. The chapter assesses the Afghan National Strategy, in addition to the NATO, EU, UN, US and UK strategies to enable comparison of approach from both national and multi-national perspectives. It subsequently outlines the current situation in the main sectors of Rule of Law within the country. Progress, to date, on reform of the justice system, transitional justice, correction and detention facilities, counter-narcotics, the Afghan National Army (ANA) and Afghan National Police (ANP) is outlined in greater detail.

After establishing the current situation across the sectors in Chapter Three, Chapter Four examines a number of conflicting options that require consideration if a new approach for Rule of Law is to be established. There is current debate and conflicting international and national positions regarding any approach that may accelerate Rule of Law initiatives. Current dichotomies include whether the Afghan Government is ready to take the lead or whether an international lead is preferred. There is also debate over implementing reform “top-down” or “bottom-up.” Further dissension occurs over the options of following a short or long-term strategy and following state-centric or traditional law. The issues of introducing a troop surge or a diplomatic surge and consideration of accepting tribal militias in the security forces also need resolution. Further international disagreement is focused on whether the ANP or the ANA should lead the fight against narcotics and therefore which organisation should benefit most from international assistance and resources. An agreement on these approaches is fundamental in order to form the baseline assumptions on which a co-ordinate, multi-national inter-agency Rule of Law strategy can be constructed.

Chapter Five concludes by outlining a wide range of initiatives that have the potential to form a new approach for Rule of Law. These initiatives include amongst others the involvement of Islamic nations (perhaps Jordan or Egypt) in judicial reform and the requirement for the establishment of unity of command under US leadership. Further initiatives include the extension of military action against narcotics dealers, the broader involvement of civilian Rule of Law experts and the acceptance of Sharia and traditional justice methods in the rural areas of the countries. In addition, involvement of the Taliban in discussions regarding traditional justice, transitional justice and binding cross-border tribal shura justice is proposed. It is recommended that Western nations drop their resistance to tribal justice and re-align their focus from a purely state-centric justice system to a devolved multi-tribal informal justice structure. The paper also concludes that the raising of a Pashtu national awakening movement crossing Afghan-Pakistan borders be adopted. A further recommendation is that international development, security and Rule of Law efforts be subjugated under a single super envoy. The envoy should be appointed by President Karzai with authority over all national security, reconstruction, developmental and Rule of Law reform.

Chapter II. BACKGROUND

Planning for Phase Four (Stability) operations in Afghanistan was difficult and complex due to its multi-faceted make-up and has been regularly widely criticized as being ill-conceived and lacking in detailed rigor and consideration. In particular, criticism has been widespread from aid agencies, academic think-tanks and Non Governmental Organisations (NGO). Within that broader criticism it has been argued that there has been a significant failure across the International community to recognize the pre-eminence of the concept of Rule of Law and access to justice and security in the post-conflict environment. The criticism has been somewhat mis-directed because Afghanistan initially achieved a period of stabilisation after the defeat of the Taliban. It was only with the resurgence of the Taliban in particular from mid 2006 onwards³ that security deteriorated markedly, leading to a halt in development and allowing a further collapse in the Rule of Law. It is more accurate to state that stabilisation planning in general was undertaken and was having some degree of success before being derailed by the return of the Taliban or the neo-Taliban. Planning efforts were disjointed and poorly coordinated. Investment, strategic guidance and local ownership were absent, whilst progress was hampered by G8 nation's incompetence and arrogance. As a result, progress in Rule of Law sectors which include policing, justice, correction facilities and prisons, narcotics, and wider detection, interdiction, investigation and prosecution activities was limited.

³ Kaplan, Eban and Greg Bruno. The Taliban in Afghanistan. Council on Foreign Relations. 2 July 2008 <http://www.cfr.org/publication/10551/> (accessed November 22 2008)

Criticism over the lack of progress with Rule of Law reform is valid because its existence is essential for creating the conditions that will allow an exit strategy for the International community from the theatre of operations.

Rule of Law is complex and definitions tend to fall into one of two areas:

Those that emphasize the ends that the rule of law is intended to serve within society (such as upholding law and order, or providing predictable and efficient judgments), and those that highlight the institutional attributes believed necessary to actuate the rule of law (such as comprehensive laws, well-functioning courts, and trained law enforcement agencies.)⁴

Legal experts, academics and scholars tend to favor the first area where the formal aspects of Rule of Law are prioritized, whereas practitioners tend to favor the second. Legal practitioners also often conclude that the “sense” of justice is more important, and it is this concept that the Taliban exploits. The Taliban era was harsh and extreme but the sense of justice and the community justice it enforced was acceptable to the people.

Those who favor an ends-based approach see the Rule of Law of being made up of a number of key entities. “A government bound by law, equality before the law, law and order, predictable and efficient rulings and human rights. The arguments between proponents of the two distinctions are one reason for lack of progress of Rule of Law within Afghanistan.”⁵ Rule of Law can be defined as follows: “That no individual, president or private citizen, stands above law. Democratic governments exercise authority by way of law and are themselves subject to law's constraints.”⁶

⁴ Belton, Rachel Kleinfeld. Competing Definitions of the Rule of Law. Democracy and the Rule of Law. Implications for Practitioners, 2. Carnegie Endowment for International Peace. Carnegie Paper No 55 January 2005. (accessed November 1 2008)

⁵ Ibid., 3.

⁶ The Rule of Law. US INFO. State. Gov <http://usinfo.state.gov/products/pubs/principles/law.htm> (accessed November 22 2008)

Thus, Rule of Law initiatives must be host nation led and the complexity inter-dependencies and linkages between the wide ranges of initiatives necessitate a multi-national, multi-agency joint strategy. The establishment of Rule of Law is therefore regarded as the most critical element of the stabilization environment as it is the foundation on which all other stabilization initiatives are built.⁷

The UN concept of Rule of Law has been based on the Brahimi Report⁸ since 2003. This concept was to progress Rule of Law reforms from a “team-based” approach. This approach additionally proposed that the historic consideration of trying to establish Rule of Law through police reform was obsolete. A holistic or whole-of-sector approach was required to include all Rule of Law sub-sectors include corrections, justice, police reform and judicial reform amongst others. After the development of the Rule of Law framework and concept by the UN in 2007, the UN established an Office of Rule of Law and Security Institutions (OROLSI) within the UN Department of Peacekeeping Operations (DPKO). It also established a Rule of Law Coordination and Resource Group in the Office of the Deputy Secretary-General of the UN.⁹ Following this, in 2007 the UN then agreed the concept for SSR within a peacekeeping environment.

One of the most basic needs for people is security and it is the primary responsibility of a sovereign nation to provide security for the people. This security can be established in various forms and to varying degrees of acceptance. The concept of

⁷ Stabilisation Issue Note. Security Sector and Rule of Law. The Stabilisation Unit , 3. <http://www.stabilisationunit.gov.uk/resources/securitysectorlaw.pdf> (accessed November 2 2008)

⁸ Durch, William J., et al. The Brahimi Report and the Future of UN Peace Operations. Washington D.C.: Henry L. Stimson Center 2003.

⁹ Blume, Till. Implementing the Rule of Law in Integrated Missions: Security and Justice in the UN Mission in Liberia, 2. Journal of security Sector Management. Volume 6 Number 3 – November 2008. <http://www.ssronline.org/jofssm/index.cfm> (accessed November 23 2008)

human security and the basic need for access to justice and transparent state legal legitimacy are fundamental requirements particularly in reconstructing a failed state.

The UK Foreign and Commonwealth Office (FCO) states the Rule of Law

Governs the relationship between the institutions in a state, and between those institutions and the citizen. It helps to hold their state to account for respecting their human rights..., helps to manage disputes between individuals... (And) provides a predictable business and economic environment that helps protect property and livelihoods, so contributing to sustainable development.¹⁰

A 2008 report by the United Nations on Rule of Law in Afghanistan concludes that “after the overthrow of the Taliban regime in 2001, the Rule of Law was conspicuous by its absence. By 2007, progress in developing the justice sector had been limited at best.”¹¹

In addition it concludes that there is “an increasing prison population...widespread human rights abuse...Police, lawyers, judges and prison staff lack training,.. grossly inadequate facilities in the penal system...and the rule of law was yet to flourish in Afghanistan.”¹²

At the International Donor Conference in June 2008, the United Nations Assistance Mission in Afghanistan (UNAMA) concluded that “increasing insecurity and narcotics production in some parts of the country serve as reminders that the long-term success of the Afghan reconstruction effort is far from secured.”¹³

¹⁰ Foreign and Commonwealth Office Strategic Priority 7 – The role of human rights, democracy, and good governance in promoting sustainable development and reducing poverty, 2.

http://www.fco.gov.uk/resources/en/pdf/pdf19/fco_hrdgg_strategyfinal (accessed November 22 2008)

¹¹ UNODC Thematic Evaluation of the Technical Assistance Provided to Afghanistan by the United Nations Office on Drugs and Crime. Volume 4 Rule of Law Program. Independent Evaluation Unit. May 2008. IV. <http://www.unodc.org/documents/evaluation/2007-afghanistan4.pdf> (accessed November 22 2008)

¹² Ibid.

¹³ UNAMA Factsheet. UNAMA International Conference in support of Afghanistan. Paris, 24 May- 4 June. 12 June 2008. [http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/MUMA-7FR57D-full_report.pdf/\\$File/full_report.pdf](http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/MUMA-7FR57D-full_report.pdf/$File/full_report.pdf) (accessed November 22 2008)

Furthermore one of its most important messages was that “the long-term success and sustainability of the reconstruction and state-building effort will ultimately depend on the ability of the Afghan state to impose the Rule of Law.”¹⁴

Individually, each assessment is disappointing. Collectively, it is a damning assessment of progress in an area fundamental to human life, dignity and human security. After years of international intervention, national and multinational initiatives and capacity building across the range of Rule of Law sectors has been limited.

From a UK military perspective, the Rule of Law is the principle that authority is exercised within a country solely by the government in accordance with laws that have been passed and disclosed and enforced according to national procedure. For a functioning Rule of Law to operate successfully, a country must have a range of capacity and capabilities. It requires a published set of laws; a police force and security apparatus to detect investigate crime and provide security. It requires also a functioning judicial system incorporating an independent judiciary with defense and prosecuting lawyers. Furthermore, it requires a corrective system or series of detention facilities to detain those who have not or will not abide by the laws of the nation.¹⁵

It follows that in a post-conflict environment many of these functions are missing, destroyed or broken. It therefore follows that a priority task in a fragile state or failed state, and particularly post-conflict is the creation or restoration of the Rule of Law as rapidly as possible. Peace and security and a functioning Rule of Law enable development and reconstruction and a rebuilding of state, provincial and regional institutions and functions of government. The creation or rebuilding of a police force to

¹⁴ “UNAMA Factsheet.” 15.

provide human security and to protect people according to national law is a fundamental necessity. It demonstrates the strength of a government and it creates the conditions for future stability. Similarly the establishment or rebuilding of a national army is also essential in ensuring that international forces and advisors are required for the shortest possible time. In addition, and in the immediate post-conflict years, a military force is required to bolster the internal security of the state, often undertaking policing functions until peace and stability is secured.

The establishment of Rule of Law within Afghanistan has been extremely slow, un-coordinated, disjointed and contradictory.¹⁶ It is assessed that in 2009 over 80% of justice is still resolved under the tradition system of justice that is tribally biased, reflective of Islamic law and discriminatory against women.¹⁷

In 2001, United States Institute for Peace (USIP) hosted a discussion entitled “Rebuilding Afghanistan: Establishing Security and the Rule of Law” with the intention of presenting a way forward for the United Nations at the UN Talks on Afghanistan held in Bonn, Germany November 26 - December 5. It concluded that

A three-pronged approach should be taken to the question of applicable law and legal authority. The size of the problem was apparent to all and the recommended solution was the adoption of the pre 1978 legal system for Kabul and the cities and the re-instating of the customary tribal justice system for the remainder of the country, with international assistance sought for a very limited number of complex or international crimes.¹⁸

¹⁵ Rule of Law in Afghanistan. UK Rule of Law Team Kabul. Core Brief April 2008.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ USIP 2001 Rebuilding Afghanistan A Framework for Establishing Security and the Rule of Law. Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, Article II (2), 2 <http://www.usip.org/ruleoflaw/rebuilding/rebuild.pdf> (accessed November 2 2008)

The final agreement adopted on December 5 2001 by the UN, states “the Interim Administration shall establish, with the assistance of the United Nations, a Judicial Commission to rebuild the domestic justice system in accordance with Islamic principles, international standards, and the Rule of Law and Afghan legal traditions.”¹⁹

From the start of international involvement in Afghanistan post 9/11 one of the key recommendations, namely the re-introduction of the tribal justice system was discounted. The exact reasons are unknown, although it is possible that it was discounted as it failed to meet the “advanced” Western democratic values and standards regarding international Law.

With the aim of rebuilding and reconstituting the state, the United Nations convened a meeting in Bonn in December 2001 between key Afghan leaders and the international community, where a path to an independent and democratic country was mapped out. This foresaw:

- Stage One: An Interim Authority led by Hamid Karzai. (From December 2001).
- Stage Two: An Emergency Loya Jirga to select and legitimise a Transitional Administration, led by President Hamid Karzai. (June 2002).
- Stage Three: A Constitutional Loya Jirga, to agree a new framework of government. (December 2003).

¹⁹ Ibid., 11.

- Stage Four: Democratic elections (the Presidential elections held in October 2004, and the Parliamentary election held on September 18 2005).²⁰

The Bonn Agreement of 2001 established the Interim Afghan Authority (IAA) and “provided the basis for an interim system of law and governance, employing the 1964 Constitution as its foundation.”²¹

In parallel with the Bonn Process, and at the request of the United Nations and the AIA,²² several G8 nations assumed responsibility for strands of Afghan development, reconstruction and SSR. Within this framework, the UK assumed leadership of the CN effort. Other nations took on responsibilities for other issues: the US for ANA development; Italy for Judicial Reform; Germany for Police Reform and Japan for Disarmament, Demobilization and Reintegration. (DDR)²³

The development of NATO involvement in Kabul in 2003 brought further impetus to harmonize International Community efforts. NATO support to the Afghan Transitional Authority (ATA) should have brought broader and deeper international support towards mission accomplishment. Its success was limited. The NATO chain of Command for Afghanistan was the International Security Assistance Force (ISAF) working to Allied Forces North Headquarters in Brunssum, Netherlands (AFNORTH). AFNORTH reported directly to Supreme Headquarters Allied Powers Europe (SHAPE).

²⁰ Operations in Afghanistan: Background Briefing 2 Afghanistan - The Year Ahead. 2006. Ministry of Defense, 1.
<http://www.mod.uk/DefenceInternet/FactSheets/OperationsFactsheets/OperationsInAfghanistanBackgroundBriefing2.htm> (accessed November 2 2008)

²¹ Afghan Government Website. Agreement on Provisional Arrangements in Afghanistan pending the Re-establishment of Permanent Government institutions.
<http://www.afghangovernment.com/AfghanAgreementBonn.htm>. (accessed October 28 2008)

²² United States Institute of Peace Special Report. No 117. Establishing the Rule of Law in Afghanistan March 2004, 11. <http://www.usip.org/pubs/specialreports/sr117.pdf>

In 2004 the AFNORTH Afghanistan strategic planning working group identified five broad lines of operations for NATO. The lines of development were to enhance the NATO mission effect, promote ATA influence and authority, extend in-theater ISAF operations, promote SSR and facilitate Afghan national development.²⁴ Rule of Law was to be considered within the governance line of development. In January 2005 and in the absence of any existing Campaign Plan, ISAF Headquarters continued developing these lines and in particular the advancement of the two political lines of operation. The aim initially was to provide a framework upon which the operational-level road-map would be built. Second, it was to provide a management approach for use by NATO's Senior Civilian Representative (SCR) in Afghanistan in support of his main effort. This work led to the development of a strategic level management model, which was referred to in NATO as the Investment Management Framework (IMF).

It was intended that the SCR, along with other leaders of the International Community, known as the Group of Principals would present the model concept to the Government. The ideas created from this work or the model itself would be then adopted by the Afghan Government. "Under its leadership, the greater planning community, including NATO planners, would be pulled together to complete or build anew a management tool to harmonize International Community and Governmental support, leading toward national rehabilitation."²⁵

These lines of development were also to form the operational level management model or the Joint Force Command (JFC) Operational Road Map. The aspiration was

²³ "Operations in Afghanistan." 1.

²⁴ ISAF V Planning Concept Brief. JFC Brunssum 2004.

²⁵ Ibid.

also that the JFC Operational Road Map would identify NATO's exit point from the country. Additionally, it was to serve to identify lines of development requiring additional out-of-theatre resources that Commander ISAF could reallocate to overcome obstacles. These additional lines of development would also accelerate the achievement of objectives and assist in determining the exit point from Afghanistan. The aim was idealistic and supposedly visionary:

The Investment Management Framework (IMF) is intended to assist all parties to end the conflict, to create conditions for self-sustaining peace and stability, to promote self-determination and reconciliation, and to rebuild the institutions and respect for Human Rights within Afghanistan. To this end, this management model is offered to President Karzai and his Government to further develop a common vision that will enhance unity of effort through consensus and coordination of all parties, and to prioritize the challenges to be met by the Government to build a legitimate and functioning state that provides for the security and prosperity of its citizens and contributes to regional and global stability.²⁶

In many respects the planning was clumsy, naive, and condescending to the Afghan government and people. Military officers engaged in this planning in NATO Headquarters had minimal experience of working on Afghan issues. They were expecting the government to commit to a plan which lacked intellectual rigor, sound analysis and local support. It was clear that the plan was flawed and the NATO approach as first initiated lasted less than 6 months. The Operational Road Map concept did continue but in a less ambitious format.

In 2004, at the same time as NATO was creating its IMF, President Karzai was establishing twelve National Priority Programs²⁷ where Ministers of the Government

²⁶ ISAF Planning Concept Brief. JFC Brunssum 2005.

²⁷ Afghanistan. Rebuilding Our Nation. 2002. Afghanistan's National Programme for Reconstruction.pdf. . <http://www.effectivestates.org/Papers/Afghanistan%20Rebuilding%20Our%20Nation%20Afghanistans%20>

were appointed to lead the International Community towards harmonized strategies and programs. It was assessed by ISAF that the NATO IMF matched only 40% of the Afghan National Strategy which identified short, mid and long-term objectives.²⁸ The polarisation of the Afghan approach and the NATO approach was increasing and progress on Rule of Law as a sub-component of the governance line of development continued to falter.

Recognizing the lack of progress and in a further attempt to re-address the problems and draw the international donor nations to work closer to achieving tangible results, President Karzai proposed yet another new strategy. At the 2006 London Conference²⁹ it was agreed that the Lead-Nation concept was over and the Afghan government was to take the lead in all areas with G8 nations becoming partner nations. The public face of the announcement showed Afghanistan taking local ownership of the issues but in reality the G8 nation's stove-piped approach had been a failure. A further strategic approach was rolled out in 2008. The Interim Strategy was established in February 2006 before the Afghan National Development Strategy (ANDS) was completed in April 2008. The ANDS is the current strategic way ahead now for Afghanistan, with an Afghan lead and serving as an overarching strategic guidance documents for all lines of development including Rule of Law.

[0National%20Programme%20for%20Reconstruction.pdf](#) (accessed November 22 2008)
<http://www.effectivestates.org/Papers/Afghanistan>

²⁸ISAF V Planning Concept Brief.

²⁹ London Conference and Afghan Compact. 31 Jan 2006. Conference centerpiece was the endorsement of the Afghanistan Compact. The Compact set out a program for Afghan development 2006-2011.
<http://www.state.gov/r/pa/prs/ps/2006/60081.htm> (accessed October 25 2008)

Chapter III. RULE OF LAW – CURRENT SITUATION

Afghan National Strategies

At the London Compact in January 2006 the Interim-ANDS gained international strategic backing from the international community. It established a number of strategic goals for Afghanistan to be achieved within five years. The four key areas were “security; governance, rule of law and human rights; economic and social development; and counter-narcotics.”³⁰ Following the London Compact, at the Paris Conference in 2008 the ANDS was adopted.³¹ This strategy was written with the assistance of international donors and the World Bank. It came into existence after President Karzai acknowledged the failings of the competing lead nation status approach to nation building and Rule of Law progress within Afghanistan.³² The strategy “articulates the Afghan government’s vision, principles and goals across the various governance sectors including police and justice.”³³ It emphasizes increased Afghan “local ownership” and “leadership.” Furthermore, it includes requirements for increasing the effectiveness of international donor assistance. To do this a joint Afghan-International Co-ordination and Monitoring Board was established to oversee implementation and to maintain political impetus.”³⁴

³⁰ European Commission. Country Strategy Paper. Islamic Republic of Afghanistan 2007-2013, 10. http://www.delafg.ec.europa.eu/en/downloadable_documents/report/plans/CSP-07-13-FINAL.pdf (accessed October 25 2008)

³¹ Welcoming outcome of Paris Conference for Afghanistan, Security Council endorses key elements identified as essential for peace, prosperity. UN Security Council. 5932rd Meeting. 11 July 2008 <http://www.un.org/News/Press/docs/2008/sc9395.doc.htm> (accessed October 25 2008))

³² Afghanistan National Development Strategy (ANDS) website. <http://www.ands.gov.af/> (accessed September 16 2008)

³³ Johnson, David T. Oversight of the US Efforts to Train and Equip police and enhance the Justice System in Afghanistan. Statement before the Subcommittee on National Security and Foreign Affairs of the House Oversight and Government Reform Committee. Washington DC. June 18 2008 <http://www.state.gov/p/inl/rls/rm/106015.htm> (accessed October 25 2008)

³⁴ Ferrero-Waldner, Benita. Commissioner for External Relations and European Neighborhood Policy EU confirms long-term commitment in Afghanistan Brussels, 12 June 2008

Following on from the Interim Afghan National Development Strategy, an Afghan Rule of Law Conference was held in Dubai in 2006³⁵ which resulted in a significant change of direction and impetus. At this US led conference, delegates agreed the responsibilities of the Afghan institutions involved in Rule of Law. It was agreed that the Supreme Court, the Attorney General's Office and the Ministry of Justice would work together to rebuild the justice sector under a new program. The new program was to be called the National Justice Sector Strategy.³⁶ Essentially this was a detailed action plan of how the Afghan Government ministries would implement the strategy including training, security and infrastructure enhancements.

More nations and international organisations had been calling for Afghans themselves to step up. "But, more than this, we now need to see real and genuine commitment from our Afghan partners. They rightly ask for more ownership in their state building process. However, with it come responsibility they must assume and a vision for their country."³⁷

NATO Strategy

There is no formal NATO Campaign Plan for Afghanistan despite NATO assuming responsibility in August 2003.³⁸ The NATO Operational Plan (OPLAN), by nature is built on consensus and is restrictive and limiting. President Karzai views the insurgency, the poverty and the insecurity within Afghanistan as inextricably linked to

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/920&format=HTML&aged=0&language=EN&guiLanguage=en> (accessed October 25 2008)

³⁵ Johnson.

³⁶ Rule of Law. UK Foreign and Commonwealth Office. <http://www.fco.gov.uk/en/fco-in-action/uk-in-afghanistan/rule-of-law/> (accessed September 18 2008)

³⁷ Ferrero-Waldner, Benita.

the opium crop. The NATO (ISAF) force was unwilling to engage militarily against the drugs traffickers and warlords for fear of retribution. In addition, many NATO nations remain unwilling to fight the Taliban (e.g. Germany) and it is unlikely that many will ever join the CN battle.³⁹ National caveats and western morality blocks progress in most areas of CN interdiction. As a result, hectares under cultivation of poppy has grown year on year with an increase from 165,000ha in 2006 to 193,000 ha in 2007, a 17% increase⁴⁰ and has expanded in the North of Afghanistan where Germany turns a blind eye to trafficking. Demand reduction initiatives and information awareness campaigns will do little to resolve the problem. The 3,000 German contingents suffer from extremely restrictive rules of engagement. With an average tour length of 3 months and with a caveat restricting night patrols and offensive action, there has been a vicious downwards spiral in security and Rule of Law in North Afghanistan instead of a virtuous circle. Many national Provincial Reconstruction Teams (PRTs) working under the ISAF mandate continue to prevent CN Advisory Teams (CNAT) working from their base locations. This effectively blocks operations within their sphere of influence. PRT Commanders need to become responsible to ISAF command instead of national command. Additionally they need to accept their role in promoting Rule of Law, assisting with the establishment of justice in their region and fighting the drugs barons. Until they do so, the situation will not improve. In 2006 as the UK-led Allied Rapid Reaction Corp

³⁸ NATO to assume command of the International Security Assistance Force (ISAF) in Kabul on Monday, 11 August 2003. NATO Press Release (2003)091 8 Aug. 2003. <http://www.nato.int/docu/pr/2003/p03-091e.htm> (accessed October 30 2008)

³⁹ Patterson, Tony. Germany rejects US demand to increase Afghan deployment. The Independent. 2 February 2008. <http://www.independent.co.uk/news/world/europe/germany-rejects-us-demand-to-increase-afghan-deployment-777239.html>. (accessed March 14 2009)

(ARRC) was about to assume command of ISAF, the UK Commander General David Richards established a ‘PRISM’ group, a group of civilian academics and specialist advisers to look at strategic issues relating to Afghanistan. One briefing identified the following major issues facing NATO:

- The importance of coherence – the underpinning process- and co-ordination of the campaign across all lines of operation.
- Commitment to all aspects of the mission by all countries.
- The re-focusing of the established operation, NATO & OEF – into a single campaign.
- The need for a single civilian lead? UN, NATO, G8, (EU Role?)
- The constant national focus on individual regions and areas of responsibility rather than theatre-wide campaign (e.g. Helmand Province for UK).⁴¹

To date these key strategic issues remain unresolved.

NATO is not the most appropriate body for overseeing strategic success in all sectors of Afghanistan. Military commander at SHAPE in Brussels and national commanders in the field can deploy too many non-negotiable caveats and have too much in-country autonomy.⁴² NATO must adapt and change. It must incorporate the political dimension more fully and exert more central authority on nations.

In 2004 the Canada led ISAF V constructed a Road Map for Afghanistan, only to see it discarded months later when the French led ISAF VI decided it was no longer

⁴⁰ UNODC Afghanistan Opium Survey 2007 Executive Summary 2007, 1.
http://www.unodc.org/pdf/research/AFG07_ExSum_web.pdf (accessed November 16 2008) (accessed November 16 2008)

⁴¹ Country Strategy Paper Afghanistan 2003-2006. European Commission External Relations Directorate General Directorate Asia. http://ec.europa.eu/external_relations/afghanistan/csp/03_06.pdf (accessed November 7 2008)

⁴² Ashdown, Paddy. Swords and Ploughshares. Bringing Peace to the 21st Century. Page 196 ISBN-13: 9780297853039. Publication: May 2007

required. Short-term planning and focus, exacerbated by the rapidly changing national command of NATO sidelined the Canadian plan within 6 months.⁴³

EU Strategy

Soon after the Bonn Treaty in 2002, the EU set out its overall objectives for Afghanistan. It initially established 43 priorities including capacity building, rural development and food security, health and economic infrastructure.⁴⁴ At the time Rule of Law was not considered to be essential in the post-conflict environment of Afghanistan. In 2005, the EU and the Government of Afghanistan adopted a new joint declaration on a range of SSR areas including CN and justice reform. This was enhanced in 2006 after the European council re-affirmed its support to the Afghan government after the London Conference, It was further affirmed in February 2007 with the Council adopting a wider remit with regard to support to human rights, police reform, Rule of Law and justice reform.⁴⁵ This paper controversially incorporated the inclusion of CN action along with police and justice training. As with other international strategies, it became apparent that the EU strategy for Afghanistan was not sufficient for the task. As security deteriorated, the Afghan Government established its new priorities under the I-ANDS and the London Compact. The EU strategy as a result, needed to change.

Whilst the first EU Country Strategy Paper (CSP) was initially focused on reconstruction, governance and infrastructure⁴⁶ the second and updated CSP 2007-2014

⁴³ ISAF V Planning Briefing Kabul. May 2004.

⁴⁴ European Commission Country Strategy Paper. Afghanistan 2003-2006. Including National Indicative Program 2003-2004. Adopted by the Commission on 11 February 2003. Page 2
http://ec.europa.eu/external_relations/afghanistan/csp/03_06.pdf (accessed November 17 2008)

⁴⁵ The European Commission. External Relations. The EU and Afghanistan. Page 7
http://ec.europa.eu/external_relations/afghanistan/intro/index.htm (accessed October 15 2008)

⁴⁶ European Commission Country Strategy Paper, 1.
http://ec.europa.eu/external_relations/afghanistan/csp/03_06.pdf (accessed October 28 2008)

laid out 3 long term priorities for future EU activity in Afghanistan. These are rural development; governance (which includes Rule of Law) and health.⁴⁷ With the publishing of the second CSP in 2007 came a change in position of the EU. The EU stated its intention to “focus on strengthening Rule of Law as key to sustainable reconstruction, governance and state building.”⁴⁸

The 2007-2014 paper also goes much further than this. Throughout the strategy paper the EU calls for Rule of Law progress to help underpin political stability. It supports the adoption of alternative livelihoods for opium farmers, the creation of conditions for economic development and strengthened state institutions. It also called for wider support to help sustain improvements in wider rural civic society. The strategy paper is now more intently focused on the breadth of Rule of Law linkages and sub-components. The strategy paper acknowledges the linkages between security, Rule of Law, CN initiatives, reconstruction, development and the “whole state building exercise in Afghanistan.”⁴⁹ It lays out details for justice reform, policing, CN programs, support for transitional justice initiatives, state structures, governance, accountability and support to the anti-corruption commission: “For the future, our major priority is an increased emphasis on the rule of law and governance. We of course greatly value our cooperation with NATO and ISAF on this program.”⁵⁰ “The new CSP aims to contribute to

⁴⁷ Ibid.

⁴⁸ A Guide for Americans. The European Union. Delegation of the European Commission to the USA. 2007.

⁴⁹ “European Commission. Country Strategy Paper,” 10.

⁵⁰ Barroso, Jose Manuel Durao. The EC in Afghanistan: Ongoing Commitment and Future Priorities. President of the European Commission NATO Summit Bucharest, 3 April 2008
<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/172&format=HTML&aged=0&language=EN&guiLanguage=en> (accessed October 25 2008)

addressing the fundamental challenges facing Afghanistan in dealing with the narcotics economy and in establishing a proper functioning rule of law”⁵¹

The changes in the EU strategy are positive. They reflect the changing environment within Afghanistan, mirror the varying Afghan political priorities from the I-ANDS and the London Compact and recognize the shifting economic, security and development situations in the rural areas. There is “an increased emphasis in this CSP on strengthening the Rule of Law and structures of government at the provincial and district level.”⁵²

This pragmatic and decisive change is likely a result of the EC long commitment in Afghanistan (it was in Peshawar in the mid 1980s and in-country from the mid 1990s).

UK Strategy

In line with UK Government working and the tradition of not having formal national strategies, there exists no formal British Government strategy for Afghanistan. In preparation for the enhanced UK deployment of forces to Helmand Province in 2006, a UK Joint Plan for Helmand was drawn up in December 2005. This joint plan was then reviewed by the Cabinet Office in October 2006 and re-endorsed but never widely published. The UK joint plan helped inform the Chief of Joint Operations’ Campaign Directive for Southern Afghanistan issued in March 2006 which was meant to be the UK national enduring directive. It was intended to capture the outcomes of a comprehensive approach and set out all lines of operations. It was to direct which agency had the lead in

⁵¹ Country Strategy Paper. Islamic Republic of Afghanistan 2007-2013. European Commission, 3. http://www.delafg.ec.europa.eu/en/downloadable_documents/report/plans/CSP-07-13-FINAL.pdf (accessed October 25 2008)

all aspects of whole-of-government support to Afghanistan. It established in particular where the Department For International Development (DFID) and the Ministry of Defense (MOD) would take the lead in the field. It also proposed measures of effectiveness and criteria for success. In parallel, each British military commander in Helmand received a personal directive from the Chief of Joint Operations prioritizing the decisive efforts to be achieved, etc. In parallel to this, the UK Armed Forces were also subject to direction from NATO. The SHAPE OPLAN, the JFC Brunssum OPLAN and the ISAF OPLAN filtered down and in 2006 the Canadian led Headquarters in RC South issued a Regional South Campaign Plan. The British, Dutch and Canadian MODs endorsed this Regional Campaign Plan and as a result a Helmand Road Map was produced in theater. The establishment of the Canadian Campaign Plan in RC South led to the UK withdrawing its whole of government Campaign Directive to have it replaced by a Canadian military campaign plan.

Confusion from multiple campaign and strategic changes resulted in limited progress in Rule of Law in Helmand. The UK civilian in charge of UK whole-of-government activities in Helmand is not answerable to the RC South NATO HQ. This has led to a lack of unity of command and effort. The end result is that any UK approach to advance CN programs, justice reform and good governance are fragmented and follow a national agenda. In December 2007 the Prime Minister Gordon Brown in a Statement

⁵² Review of EC Country Strategy Paper: Islamic Republic of Afghanistan - 2007-2013. Reliefweb 8 May 2008. <http://www.reliefweb.int/rw/RWB.NSF/db900SID/PANA-7EFC4S?OpenDocument> (accessed October 25 2008)

to the House of Commons⁵³ placed British support to Afghanistan and Rule of Law in particular in context. In lieu of a national strategy, he articulated a comprehensive framework for security, political, social and economic development within the country.

British strategy was to be based on four key areas:

Encouraging and supporting more Afghan ownership, including of the security effort, supporting the Government of Afghanistan as they seek to build democracy and governance at local levels, backing the Government of Afghanistan's attempts to dismantle the insurgency through a politically led approach and helping the Afghan government meet the demands of the Afghan people by backing initiatives that encourage economic regeneration and social/ economic development.⁵⁴

The UK FCO which has the lead on overseas policy is working to support the Afghan Government's objectives for Rule of Law as directed under the ANDS. The UK strategy on Rule of Law is to support the goals of achieving security, both state security and human security whilst at the same time supporting "governance, Rule of Law and human rights, strengthen[ing] democratic practice and institutions, human rights, the Rule of Law, delivery of public services and government accountability."⁵⁵

The UK strategy is focussed in three cross-cutting arenas. First, it remains the key international partner in dealing with counter narcotics activity across the country. Second, it is Helmand focussed on operations and promotes development and re-construction through its PRT. Third, it provides multi-donor financing and programmes through DFID across the Rule of Law sector.

⁵³ Statement on Afghanistan. Number 10.gov.uk. The official site of the Prime Minister's office. Wednesday 12 December 2007 (12 December 2007). <http://www.number10.gov.uk/Page14050> (accessed October 25 2008)

⁵⁴ Why we are in Afghanistan. Foreign and Commonwealth Office. <http://www.fco.gov.uk/en/fco-in-action/uk-in-afghanistan/why-we're-in-afghanistan/> (accessed October 26 2008)

⁵⁵ Rule of Law. Foreign and Commonwealth Office. <http://www.fco.gov.uk/en/fco-in-action/uk-in-afghanistan/rule-of-law/> (accessed October 26 2008)

In early 2008 the UK comprehensive approach, security, governance and reconstruction, finally resulted in a UK Road Map for Helmand province.⁵⁶

Unfortunately, it also follows the “bottom-up” national isolationist planning seen throughout Afghanistan. It again focuses on a narrow perspective e.g. Helmand Province.

UK strategy is hampered by a fundamental disconnect between the FCO, the MOD and DFID. DFID, the UK equivalent of USAID was created as a stand-alone organization in 1997. It has the lead in UK overseas development and reconstruction yet is legislatively mandated by the 2002 International Development Act to spend only on projects that will relieve poverty.⁵⁷ DFID, along with the FCO and the MOD also funds the Security Sector Defense Advisory Team (SSDAT), created in 2005 to deliver “advice on security sector management, governance and development.”⁵⁸

It has a limited advisory role and was excluded from UK planning to deploy to Helmand in 2006. With a small staff and whilst offering an alternative approach to UK thinking on Rule of Law support, as yet it is lacking real credibility. It is joint, multi-agency and aims to create hold and deploy civilian experts with the skills to assist in Rule of Law initiatives in post conflict countries in time. In addition the UK has a Stabilisation Unit, again joint and interagency and owned jointly by DFID, FCO and MOD which exists to “prevent or reduce violence, protect people and key institutions, promote

⁵⁶ Helmand Province Strategy Document. UK. 2008.

⁵⁷ Overall framework and new orientations. UK offers a powerful model for development co-operation. United Kingdom (2006), DAC Peer Review: Main Findings and Recommendations. OECD. Review of the Development Co-operation Policies and Programmes of the United Kingdom. http://www.oecd.org/document/43/0,2340,en_2649_34603_36881515_1_1_1_1,00.html (accessed October 26 2008)

⁵⁸ Security Sector Development Advisory Team. MOD website. <http://www.mod.uk/DefenceInternet/AboutDefence/WhatWeDo/SecurityandIntelligence/SSDAT/> (accessed October 26 2008)

political processes which lead to greater stability, and prepare for longer term non-violent politics and development.”⁵⁹

US Strategy

The US Army doctrine which considers Rule of Law in a post conflict environment is set out in FM3 – 07 Stability Operations. The US doctrine states Rule of Law requires “measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in applying the law, separation of powers, participation in decision-making and legal certainty.”⁶⁰

This approach is somewhat idealistic, Western value-based and anti-Islamic. The Afghan Rule of Law is based on Islamic law and traditionally does not offer women equality under the law. Afghan law is also based on customary law and only in parts is it based on Western law.⁶¹ This conflict in the application of Western legal approaches has exacerbated the problem. Similarly Army doctrine concentrates on the wider role of Rule of Law. It aims to limit the power of the government, to dictate government conduct and to act as a vehicle to resolve disputes peacefully. Simultaneously, as Army doctrine is stressing the need for Rule of Law to limit the power of the government, the US intelligence community is reporting that there is a “systemic weakness of Afghanistan's central government”⁶² and that the US is undertaking a thorough review of national

⁵⁹ What is the Stabilisation Unit? The Stabilisation Unit. <http://www.stabilisationunit.gov.uk/> (accessed October 26 2008)

⁶⁰ FM3-07 Stability Operations. October 2008. Headquarters Department of the Army 1-40-1-43 <http://www.globalsecurity.org/military/library/policy/army/fm/3-07/fm3-07.pdf> (accessed November 16 2008)

⁶¹ Suhrke, Astri and Kaja Borchgrevink. Negotiating Justice Sector Reform in Afghanistan. Crime Law and Social Change Journal. 2008/2009, 4.

⁶² US Intelligence - Afghanistan in 'downward spiral' under Hamid Karzai's government. Daily Telegraph 9 October 2008. <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/3166259/US-intelligence-Afghanistan-in-downward-spiral-under-Hamid-Karzais-government.html> (accessed November 16 2008)

policy to Afghanistan. “The US Rule of Law Strategy is named the US Justice Sector Strategy for Afghanistan and is focused on three strands. It aims to increase the capacity of the national justice institutions, extend justice to the provinces and improve international and NGO donor co-ordination to justice strategy.”⁶³

Within Afghanistan the US strategy has been to support President Karzai and a strong central government. It has supported the Afghan constitutional model of government and has supported President Karzai in marginalizing the regional warlords in order to limit their effect on destabilizing the Government.⁶⁴ US strategy also favors eradication as the prime means of attacking the narcotics trade and wishes to promote aerial spraying, a strategy that finds no support from President Karzai or the UK. US strategy in Afghanistan is based on four pillars. Continuing combat operations within ISAF and alone, operating PRTs, equipping and training the ANA and ANP.⁶⁵ The linkages of these pillars to the recently created Rule of Law strategy are still limited.

The United Nations (UN)

In May 2008 the UN Office on Drugs and Crime (UNODC) reported on its evaluation of support to Afghanistan in a number of areas of Rule of Law. The assessment outlines significant internal and relationship failures within the UN sphere of influence.⁶⁶ It assessed that progress in developing the Justice Sector has been “limited at best... police, lawyers, judges and prison staff lack numbers and training, the penal system has grossly inadequate facilities. Corruption was a serious problem. UNODC

⁶³ Johnson, 2.

⁶⁴ Katzman, Kenneth. Afghanistan: Post-War Governance, Security and U.S. Policy. CRS Report for Congress. Updated 29 September 2008. Prepared for Members and Committees of Congress, 12. http://assets.opencrs.com/rpts/RL30588_20080929.pdf (accessed November 16 2008)

⁶⁵ Ibid., 202

work with UNOPS did not proceed smoothly and UNODC's work and its impact on development of national capacity were limited.”⁶⁷ As well as criticizing the organization in general, it also severely criticized in detail aspects of its own Rule of Law program. “In UNODC, a competitive spirit, or a desire for credit and recognition, sometimes trumps coordination with national and international entities, to the detriment of meeting national needs.”⁶⁸

This frank assessment of international and organizational failure is indicative of the current failure of current Rule of Law initiatives in Afghanistan. However, the “UN was set up as a law making institution not an overseer of military action of security reform.”⁶⁹ The failure of the UN to demonstrate adequate leadership is well documented. The lack of recognition of internal limitations was also a failure and new strategic direction under an experienced leader is now required.

Afghan Justice System

A state justice system is a key element of national infrastructure that serves as a line of defense against a multitude of social problems facing a nation and its people. It follows that a key imperative for a state is to have a functioning and trusted justice system. A justice system “normally refers to positive law that functions through legal

⁶⁶ “Thematic Evaluation Volume 4,” iv.

⁶⁷ Ibid.

⁶⁸ Thematic Evaluation of the Technical Assistance Provided To Afghanistan By the United Nations Office on Drugs and Crime Volume 1 Consolidated Evaluation Report Independent Evaluation Unit May 2008. Page 14 <http://www.unodc.org/documents/evaluation/2007-afghanistan1.pdf> (accessed September 18 2008)

⁶⁹ Ashdown, 195.

codes and state institutions, such as the courts, police, prosecutors, the legal bar and prison service.”⁷⁰

Formal constitutional law is based on a combination of state law and Sharia (Islamic law) and was partially modeled on the Egyptian moderate Sharia legal system. In addition, within the country there is a widespread preponderance of customary law.⁷¹ This law is based on unwritten behaviors, religious traditions and social norms. The Uzbeks, Tajiks, Hazarra and Pashtun all follow customary law that is binding and used to resolve local conflicts within the context of tribal Jirga, Shura or Councils of Elders. To enforce the law, and particularly in the 1970s and 1980s, a complex system of courts and judiciary were used. The Soviet invasion in 1979 had little effect on the justice system within Afghanistan⁷² and that justice system is still in existence and relevant today.

The judiciary exists today across four main levels. The Supreme Court as the highest level exists as an independent Department of State. At the second level there is the Courts of Appeal and Primary Courts to deal with commercial, public rights and public security. This is set out in the Constitution of the Islamic Republic of Afghanistan 2004.⁷³ At the third level are the Primary Courts in each district. At the fourth level there are two additional courts. There are Urban Primary Courts in each Province to deal with criminal, civil and security related offences. Additionally, there are specialised courts

⁷⁰ Bridging modernity and tradition. Afghanistan Human Development Report 2007. Rule of Law and the Search for Justice. UNDP. Chapter 4. The Judicial System, Police and the Legislature, 69. <http://hdr.undp.org/en/reports/nationalreports/asiathepacific/afghanistan/name,3408,en.html> (accessed November 1 2008)

⁷¹ Senierte, Amy. Rebuilding the Judicial Sector in Afghanistan: The Role of Customary Law The Fletcher School Online Journal for issues related to Southwest Asia and Islamic Civilization Spring 2006, 1. http://fletcher.tufts.edu/al_nakhlah/archives/spring2006/senier.pdf (accessed November 1 2008)

⁷² Vogelsang, Willem. The Afghans (Oxford: Blackwell, 2002), 4.

dealing with single issue offences including military courts, national security issues, counter-narcotics, criminal justice cases and courts dealing with property issues.⁷⁴

Other customary organisations include Community Development Councils which have the possibility to play a central role in community justice in rural life. These councils were created under the National Solidarity Program (NSP) in rural areas to help and develop the ability of Afghan communities run their own communities through elected village councils.⁷⁵

Within the justice system the lack of clear cross-ministry co-ordination has prevented major advances in reform of this sector of Rule of Law. The Afghan Ministry of Justice itself assessed that 90% of Afghans still rely on customary justice and law.⁷⁶ The majority of those utilizing state justice do so primarily to settle land disputes. The Ministry of Interior (MOI) is responsible for policing whilst the Attorney-General's office is responsible for investigation and prosecution. The Ministry of Justice is responsible for central prisons and detention facilities and the Supreme Court is responsible for acting as the highest court and also for management of the court system.⁷⁷

⁷³ The Constitution of the Islamic Republic of Afghanistan 2004. Article 116. Chapter 7, 20. http://www.diplomatie.gouv.fr/en/IMG/pdf/The_Constitution_of_the_Islamic_Republic_of_Afghanistan.pdf (accessed November 2 2008)

⁷⁴ The Supreme Court. Law of the Organization and Authority of the Courts of Islamic Republic of Afghanistan. Islamic Republic of Afghanistan Supreme Court's Final Draft /Checchi/ Translation/Fayeq, May 19, 2005. http://www.afghanistantranslation.com/Laws/Law--Organization_and_Authority--Courts_ET_ET.pdf (accessed November 2 2008)

⁷⁵ Collender, Guy. Community councils and microfinance boost development in Afghanistan. Institute of Development Studies (IDS). Reliefweb. 20 Feb 2008. <http://www.reliefweb.int/rw/rwb.nsf/db900SID/ASIN-7BZLRF?OpenDocument> (accessed November 2 2008)

⁷⁶ Challenges and the Way Forward for the Justice Sector in Afghanistan. Justice for All. A Comprehensive Needs Analysis. Ministry of Justice. Government of the Islamic Republic of Afghanistan. Kabul July 2005, 20. http://www.cmi.no/pdf/?file=/afghanistan/doc/Justice_for_all_MOJ_Afgh.pdf (accessed November 2 2008)

⁷⁷ Rule of Law in Afghanistan Core Brief 2008. UK Rule of Law Team. Kabul.

A significant percentage (40%) of judges lacks any university degree and 80% of prosecutors have no formal qualifications.⁷⁸

The Italians were lead nation in respect of the justice sector and progress has been slow. The main aim of the Italian approach was the creation of a simplified and streamlined code of criminal procedure which was adopted into Afghan law in 2004.⁷⁹ The code was drafted with US military assistance yet had little Afghan input and therefore had limited Afghan support. Only after strong international diplomatic pressure did President Karzai adopt the code. Thus Afghanistan has a legal code that lacks Afghan local ownership, has limited national support and reflects western values instead of national muslim traditions.⁸⁰

The justice system lacks capacity, lacks capability and is still incapacitated by corruption. The World Bank's assessment is that Afghanistan has performed to a very low standard in dealing with corruption. In six separate dimensions of governance, Afghanistan "is in the bottom eight of countries with severe governance and is amongst the worst in terms of Rule of Law."⁸¹ The governance dimensions include political stability, government effectiveness, regulatory quality, voice and accountability, Rule of Law and control of corruption.

⁷⁸ Ibid.

⁷⁹ United States Institute of Peace Special Report. No 117. Establishing the Rule of Law in Afghanistan March 2004,8. <http://www.usip.org/pubs/specialreports/sr117.html> (accessed November 2 2008)

⁸⁰ Suhrke, Astri and Kaja Borchgrevink. 4

⁸¹ Managing Public Finances for Development. World Bank. 2005 Afghanistan,. Main Report (Volume I) December 22, 2005 Poverty Reduction and Economic Management Sector Unit South Asia Region Chapter 7, 60.

http://siteresources.worldbank.org/AFGHANISTANEXTN/Resources/305984-1137783774207/afghanistan_pfm.pdf (accessed November 2 2008)

Transitional Justice

Transitional justice is the procedure or process for resolving the legal problem of historic human rights abuses, tribal and sectarian murder, rape and other human atrocities. In Afghanistan it refers not just to the Taliban era but also in the period of civil war (1992-1996). It includes truth-seeking commissions, individual prosecutions, vetting, reparations and removal of offenders from office. The issue of transitional justice and the way forward was set out in the 2007 Justice for All strategy documents which identified that transitional justice was the “most sensitive legal and security issue within Afghanistan.”⁸² The Afghan government’s position is that without access to state justice for all people, Afghanistan “as a state is called into question.”⁸³

Successive attempts by the International Community to seek a resolution to the problem have been repeatedly sidestepped by President Karzai. The continued failure to address the problem and the Afghan people’s perception of past atrocities continues to undermine the trust in the Rule of Law process. It continues to feed corruption within the regions where past regional warlords like General Abdul Rashid Dostum and Atta Mohammad Noor are now cabinet members. They continue to exercise undue influence across large regions of the country, often sustained by corruption and narcotics. The concept of personal fiefdoms and personal patronage remains strong today in Afghanistan. The 2005 Justice for All strategic document included an analysis of the justice problems within Afghanistan and a way forward. The subject of transitional

⁸² Challenges and the Way Forward for the Justice Sector in Afghanistan. Justice for All. A Comprehensive Needs Analysis. Ministry of Justice. Government of the Islamic Republic of Afghanistan. Kabul July 2005, 20. [http://www.cmi.no/pdf/?file=/afghanistan/doc/Justice for all MOJ Afgh.pdf](http://www.cmi.no/pdf/?file=/afghanistan/doc/Justice%20for%20all%20MOJ%20Afgh.pdf) (accessed November 2 2008)

⁸³ Ibid.

justice was conspicuous by its absence. In 2001, the Afghan Independent Human Rights Commission (AIHRC) published a detailed report into systematic human rights abuses across the country from 1978 until 2001. It summarized that “accounting for the worst of the crimes committed continues to be an issue of great concern to many Afghans... and. indicates strong support among Afghans to address the legacy of the past.”⁸⁴

The AIHRC is not alone in calling for action on transitional justice. Since 2002 the International Centre for Transitional Justice, the AIHRC, UNAMA and other human rights organisations and NGOs have called for action. They have been pushing for President Karzai to bring to account those in his government and elsewhere who are guilty of wide-scale human rights violations.⁸⁵

In 2005 President Karzai endorsed the AIHRC report and established the Action Plan for Peace, Reconciliation, and Justice in Afghanistan. The plan was launched in 2006, included within the London Compact and was to encompass five measures: “According dignity to victims, including through commemoration and the building of memorials; vetting human rights abusers from positions of power and encouraging institutional reform; truth-seeking; reconciliation; and establishing a task-force to recommend an additional accountability mechanism.”⁸⁶

However, little progress has been made to date. Despite inclusion of support in the London Compact, in mid-2007, the Afghan Parliament passed a resolution that

⁸⁴ Casting Shadows: War Crimes and Crimes against Humanity. The Afghanistan Justice Project 1978-2001 Documentation and analysis of major patterns of abuse in the war in Afghanistan, 4. Published 2005. <http://afghanistanjusticeproject.org/warcrimesandcrimesagainsthumanity19782001.pdf> (accessed November 2 2008)

⁸⁵ AIHRCs Recommendations to the Paris Conference. Afghanistan Independent Human Rights Commission. Kabul, Saur 31, 1387 (May 20, 2008). <http://www.aihrc.org.af/> (accessed October 28 2008)

⁸⁶ Afghanistan. ICTJ Activity. International Centre for Transitional Justice. Afghanistan. <http://www.ictj.org/en/where/region3/507.html> (accessed October 28 2008)

granted amnesty to all those involved in the conflicts over the past 25 years. The law was subsequently rewritten to allow those who had suffered abuse to bring charges against the warlords. President Karzai never signed this amendment and to date the status of the law is still unclear.

Correction and Detention Facilities

Further evidence of Rule of Law failure was also highlighted within the UN in its correction facilities programs and program management failures. The UN assessed that progress on prison construction and prison reform has been the most disappointing element of Rule of Law in Afghanistan. Each of the thirty-four provinces has a prison with the majority being in disrepair, insecure and riddled with corruption. Criminals regularly bribe or buy their freedom and the competing National Directorate of Security (NDS) and MOI jails are often needed to keep serious criminals from utilizing contacts within one or other organisation to secure their release. Within Afghanistan, prison reform is complicated by the growth in prison population year on year since 2001. The problem is exacerbated by the cultural trend of female prisoners keeping children with them in jail. Reform has been slow for numerous reasons. The rumors that newly constructed jails may be used by coalition forces for detaining Al Qaida and the Taliban has further alienated some western donors. The lack of human rights, endemic corruption, sexual assault and use of torture within the prisons has had an adverse effect on progress. More limiting though has been the disjointed and poorly managed UN program to refurbish a wing of the largest prison in Afghanistan, Pol-E-Charki prison in Kabul. A failure in program management and inter- UN rivalry has stalled its construction. In

addition, following executions at Pol-E-Charki, a number of nations including UK Norway, the UN and the EU made clear to the Afghan government their opposition to the death penalty. This convergence of opinion has raised concerns of future western involvement in correctional facilities provision.⁸⁷

Counter-Narcotics (CN)

Perhaps the most significant threat to the establishment of Rule of Law within Afghanistan is the continued growth in production of narcotic crops, particularly opium. The spread of narcotics production, harvesting, trafficking and expansion into other drugs e.g. cannabis production threatens not just the economy but also the government and regional stability. The opium industry has been the most destabilizing activity for the last seven years. It has undermined all efforts by the government, the International Community and NATO to affect Rule of Law within the country. It also funds the insurgency, promotes and sustains corruption and destabilizes the economy. Additionally, it promotes cross-border smuggling, enslaves the poor and distorts tribal structures and ethnic social systems both within the country and across tribal borders in Pakistan, Tajikistan, Iran and Uzbekistan.

In reality, the progress in the CN program has been limited. The Criminal Justice Task Force is still limited in capability. It has fifty investigators, twenty eight prosecutors from the Attorney General's office and fourteen judges from the Supreme Court. Only 2,250 Counter-Narcotics Police have been trained whilst limited forensic labs and intelligence units have been created. Just nine mobile detection teams have been

⁸⁷ "Rule of Law in Afghanistan," 24.

introduced and 20,000 hectares of poppy eradicated.⁸⁸ When placed into context that 93% of the world opiates originate in Afghanistan and that it took twenty years to rid Pakistan of opiates, the progress has been negligible. Progress has been disappointing primarily because of a lack of will in the government and a lack of unity of purpose in the CN fight. Corruption within the government remains endemic and allegedly President Karzai's own brother has grown wealthy through narcotics trafficking. Sher Mohammed Akundzada, the Governor of Helmand was dismissed by President Karzai in 2005. This was at the insistence of the British government as a pre-requisite for increased British military commitment to Helmand Province because of his links to narcotics.⁸⁹ The UK government policy is that UK forces will fight the drug traffickers with military force. The US government policy differs in that to date it has been against military action on drug warlords. The US policy is that the CN fight is a police matter and prefers eradication as its CN policy focus.⁹⁰ NATO is also against fighting the drug warlords and Germany in particular has refused to pass on intelligence relating to CN in-country because of fear of reprisals against their troops, embassies and NGOs.⁹¹

The narco-state label affixed to Afghanistan post 9/11 is misleading as it was the world's chief producer of illicit opium by the early 1990s, and produced "70 per cent of illicit opium worldwide by 2000."⁹² Today, it is responsible for approximately 93%.⁹³

⁸⁸ Afghanistan Counter Narcotics Script. UK Embassy, 7. April 2008.

⁸⁹ Afghanistan's Tribal Complexity. In the dark. The Economist. Jan 31st 2008 | Sangin District Helmand. http://www.economist.com/world/asia/displaystory.cfm?story_id=10608929 (accessed October 26 2008)

⁹⁰ Zacharia, Janine. Afghanistan At Odds With US On Plan To Curb Opium. Bloomberg News Service, August 8, 2007 http://www.csdp.org/news/news/bloom_afghan_080807.htm (accessed October 2008).

⁹¹ Authors experience. Kabul March 2004

⁹² Byrd, William and Christopher Ward. Drugs and Development in Afghanistan, Social Development Paper No. 18 (World Bank, December 2004), 3. <http://www.gtz.de/en/dokumente/en-wb-drugs-development-afg.pdf> (accessed November 8 2008)

⁹³ Afghanistan: Opium Survey 2007. United Nations Office on Drugs and Crime, Executive

“It is difficult to over-state the dangers of the ‘opium economy’ for our country and the region’s future. It is the single greatest challenge to the long term security, development and effective governance of Afghanistan.”⁹⁴

The UK is the designated partner-nation on CN and currently assists the government in implementing the National Drug Control Strategy. This strategy is based on eight pillars that cover the range of activities that constitute CN crime. These pillars are criminal justice, eradication, regional co-operation, interdiction and law enforcement, alternative livelihoods, demand reduction, building institutions and an information campaign.⁹⁵ In any post-conflict environment, progress is dependent on security and state, provincial and regional buy-in. Many of those in positions of power or authority are corrupt. Some NGOs and nations will not deal with potential war criminals, tribal warlords or tribal/provincial/regional governments lacking in democratic principles. A suspension of the pre-requisite for democratic practice would result in rapid progress at the regional level through the engagement of key leaders and the selective creation of alliances.

Afghan National Police (ANP)

When the G8 nations initially accepted responsibility for lead nation status in 2002, Germany accepted responsibility for Police Reform. Almost immediately the German approach to police training and Rule of Law differed from other nations.

Summary (August 2007), p. iv. http://www.unodc.org/pdf/research/AFG07_ExSum_web.pdf (accessed November 8 2008)

⁹⁴ President Karxai. An Updated Five-Year Strategy for Tackling the Illicit Drug Problem Kabul, Afghan National Drugs Control Strategy. January 2006. Page 4
http://www.fco.gov.uk/resources/en/pdf/pdf18/fco_nationaldrugcontrolstrategy (accessed September 18 2008)

⁹⁵ “Afghanistan Counter Narcotics Script,” 11.

Germany favored a two-year training program for the ANP. The UK and the US favored an eight to twelve-week training program with the need for rapid deployment of policemen trained to a basic standard, rather than a few officers trained to a high standard.⁹⁶ From 2002-2007, Germany had trained only 4,500 Afghan policemen utilizing only forty German police trainers.⁹⁷ Frustrations regarding the slow progress of German police reform led the US in 2003 to take on additional police reform and police training in parallel to the German scheme.⁹⁸ With the arrival of the Canadian led ISAF V Headquarters in Kabul in 2004, it proposed its own police training program in Kandahar Province for local ANP. This Canadian frustration with the German program led other nations (e.g. UK in Helmand Province) to also launch local initiatives through the Provincial Reconstruction Team (PRT) concept. By 2006 there was a multitude of varying stand-alone police training programs.

In 2006 the EU sent an assessment team to Afghanistan to investigate the progress of Rule of Law progress. The report was classified and presented in October 2006 outlining the strategic necessity for the EU to become involved in Rule of Law.⁹⁹

A Crisis Management Concept for the mission was announced in February 2007 stating:

The mission will work towards an Afghan police force in local ownership that respects human rights and operates within the framework of the rule of law. The mission should build on current efforts, and follow a comprehensive and strategic approach, in line with the CMC. In doing so, the mission should address issues of police reform at central, regional and provincial level, as appropriate.¹⁰⁰

⁹⁶ Authors experience from discussions in HQ ISAF with UK Embassy Staff. March 2004

⁹⁷ Assistance in Rebuilding the Afghan Police Force. German Federal Ministry of the Interior. http://www.bmi.bund.de/nr_1165434/Internet/Content/Themen/Police/Afghanistan/DataAndFacts/Einfuehrung_Aufbauhilfe_Afghanistan_en.html (accessed September 18 2008)

⁹⁸ Katzman, 37.

⁹⁹ EUPOL Afghanistan – an opportunity for whom? ISIS Europe. European Security Review. Number 33, May 2007, 1. http://www.isis-europe.org/pdf/2007_artrel_27_esr33eupolafghanistan.pdf (accessed November 2 2008)

¹⁰⁰ Ibid., 2.

Unfortunately, the timing and strategic necessity of the EU proposal was linked to the goals of the Afghan Compact that itself was based on an understanding that conflict would have ended.¹⁰¹ In addition, a major reason for the European Policing (EUPOL) initiative, launched in Jun 2007 with 232 Officers¹⁰² was to co-ordinate the EU policing initiatives, not to deal with the Afghan policing requirement. The EUPOL concept initially called for 167 Officers with a later proposal in 2008 to expand this to 300. The EUPOL concept excluded the US police training initiatives which concentrated on the provision of paramilitary training to police officers. There was always a suspicion that Germany favored the EUPOL initiative as a means to concentrate on civilian policing support in Afghanistan to help deflect the mounting criticism of its reluctance to commit troops to fight in the southern provinces. Despite this, the UN Security Council adopted Resolution 1746 (2007) on March 23, which welcomed the decision by the EU "to establish a mission in the field of policing with linkages to the wider rule of law and counter-narcotics, to assist and enhance current efforts in the area of police reform at central and provincial levels, and looks forward to the early launch of the mission."¹⁰³

The EUPOL mission is primarily Kabul centric with limited influence at the regional and provincial level and has suffered from what many claim is poor leadership and a desire to have a strong admin support staff in the headquarters. Little impact is being achieved by a relatively few police trainers who refuse to deploy to the regions or

¹⁰¹ Ibid.

¹⁰² 2007 EU-Canada Summit Statement. Office of the Prime Minister of Canada. 4 June 2007 Berlin. <http://www.pm.gc.ca/eng/media.asp?id=1683> (accessed November 2 2008)

¹⁰³ United Nations Resolution 1746 (2007) Adopted by the Security Council at its 5645th meeting on

train policeman in Regional Command (RC) South where the fighting is fiercest. The EUPOL initiative is widely assessed to be a politically visible contribution from Germany, whilst lacking in any real influence. It was also late to deploy on task and suffered constant logistic problems.

The UK government believes that the US initiative of Focused District Development is the way forward with regard to police training.¹⁰⁴ The UK Annual Report to Parliament stated

There is widespread evidence of corruption, poor leadership and a lack of credibility in Afghanistan's police...that in turn leads to further decline in respect of Rule of Law, expectations are often too high, donor plans are often limited and short term and nations and militaries don't work in a cohesive manner. We see the problem that donors are too fixed on working with the 'formal institutions' at the centre of government and little attention is paid to informal structures and their interaction with the devolved state level institutions.¹⁰⁵

This US initiative is starting to have positive results across the country.

Afghan National Army (ANA)

The justice sector in Afghanistan recognizes the need for an army, even if it's primarily function is a policing function. Conceptually an army sits at the centre of the 'Circle of Justice'. The ninth century Islamic scholar Ibn Qutayba wrote "there can be no government without an army, no army without money, no money without prosperity, and no prosperity without justice and good administration."¹⁰⁶

23 March 2007 Distr.: General 23 March 2007. <http://www.unama-afg.org/docs/ UN-Docs/ sc/ resolutions/sc1746.pdf>. (accessed November 2 2008)

¹⁰⁴ Defense Secretary Submission to Parliament Mon 16 Jun 2008.

¹⁰⁵ Pearce, Hilary. Post-Conflict Reconstruction of the Justice Sector in Sudan: 2007_Series. Number 15/08 Keynotes Cranfield SSM Case Study Series. Updated January 2008, 6. http://www.ssronline.org/edocs/keynote1508_sudan.pdf (accessed November 20 2008)

¹⁰⁶ Afghanistan National Development Strategy Draft. Summary of ANDS Justice Sector Strategy. Islamic Republic of Afghanistan. January 2008, 1. <http://www.ands.gov.af/ands/jcmb/site/src/Meeting%20and%20Documents/seventh%20JCMB/files/IV.%20>

Whilst justice in this context is the final destination, it takes an army to take it there. The ANA is 75,000 strong with an expected 86,000 to be in uniform by the end of 2008. The US is the lead partner nation for training the ANA and does so primarily through Combined Security Transition Command- Afghanistan (CSTC-A). The ANA is mentored by ISAF, but predominantly with US, UK and Canadian forces. Of the 3,200 Operational Mentoring and Liaison Team (OMLT) identified positions in ISAF in 2005, only 1,200 billets were filled by NATO nations.¹⁰⁷ The ISAF mentors embedded in Battalions of Kandaks, live, sleep and fight with them. The isolated and dangerous mentoring task, particularly in the south is ignored by many ISAF nations. The ANA is taking an increasing role in fighting the Taliban but rely heavily on ISAF and OEF troops. A recent US Government Accountability Office (GAO) review of the ANA concluded in June 2008 of 105 ANA units, only two were fully trained to conduct their primary mission.¹⁰⁸ Congress noted that despite the lack of a strategy, the US had invested \$10Bn. in the ANA. It therefore directed that SECDEF in conjunction with Secretary of State produce a strategy for the strengthening of the ANSF. A clear lead was not directed by Congress and thus no action was taken. The report to Congress found the ANA poorly equipped, poorly led, poorly recruited and with poor retention. The GAO found that these problems were a result of “competing U.S. global priorities. Without

[0ANDS%20Documents/Justic%20Sector%20Strategy.%20Draft%20Summary%20-%20English.pdf](#)
(accessed November 1 2008)

¹⁰⁷ Authors experience from UK/US Afghan planning meeting. CENTCOM December 2005.

¹⁰⁸ Further Congressional Action May Be Needed to Ensure Completion of a Detailed Plan to Develop and Sustain Capable Afghan National Security Forces. United States Government Accountability Office. Report to Congressional Committees. June 2008 . GAO-08-661 Jun 2008. <http://gao.gov/products/GAO-08-661> (accessed November 2 2008)

resolving these challenges, the ability of the ANA to reach full capability may be delayed.”¹⁰⁹

The Department of Defense (DOD) stated that Congressional guidance on strategic planning was sufficient, whereas the Department of State disagreed and requested additional guidance. The two US departments are still unable to agree on a way forward and a strategy for ANA sustainment is still not completed. Without strategic guidance, it is unlikely that partner nations and DynCorp, who assist with ANA training, will succeed in working to a common goal. A fully trained and capable ANA is the western exit strategy. The continued lack of strategy and leadership requires rectification.

¹⁰⁹ “Further Congressional Action May Be Needed.”

Chapter IV. CONFLICTING STRATEGIC OPTIONS

The limitations to progress in Rule of Law have been described in detail in Chapter Three. There is no shortage of opinion how to move this progress onwards. Unfortunately the strategic options being considered by international organizations, military forces and NGOs are conflicting. This Chapter outlines in broad terms some of the main strategic arguments currently being debated regarding the direction of strategy and the problems with operational implementation of that strategy. It demonstrates that national and international strategic divergence can occur despite the well-intentioned efforts of governments and field experts. Similarly, it is apparent that service infighting for budget enhancement is not only a western phenomenon. Competition within Afghan departments for resourcing is compounded by Western security strategy regarding ANA and ANP support.

The Afghan Approach or an International Approach

The Clingendael Institute,¹¹⁰ in a paper on effective programming for justice and security development, concludes that it is most effective when “expectations are kept modest and goals prioritized.”¹¹¹ It concludes also that there is no one single method of justice or security better than another but what is most important is that a blend and integration of various initiatives is the best approach to take in a post-conflict environment. The justice and security goals set by the G8 nations in 2002 have not been realized.

¹¹⁰ Ball, Nicole Eric Scheye and Luc van de Goor. From Project to Program: Effective Programming for Security and Justice. Netherlands Institute of International Relations. ‘Clingendael’ Conflict Research Unit December 2007, 2. http://www.clingendael.nl/publications/2007/20071211_cru_occ_ball.pdf (accessed November 2 2008)

¹¹¹ Ibid.

A common statement repeated by President Karzai is that there must be an Afghan solution to an Afghan problem. International donors hear the message. They prefer to channel aid, reconstruction and Rule of Law programs via their own embassies and national aid agencies and NGOs rather than allowing Afghan national structures to be rebuilt in the Afghan way.

A frequent criticism by international donors is that there is little political support for their efforts by President Karzai and the national leadership. Critics will argue that the Afghan Compact, the Afghan National Development Strategy and the Afghan National Security Strategy are Afghan documents and outline the way forward for Rule of Law in the country. In reality, much of the content was written with or by foreign advisers, to ensure it fitted with the international community perception of how best to secure international aid, development and security assistance.

“Bottom-Up” or “Top-Down” approach

The official British military position is that a “bottom-up” approach is preferable.¹¹² Other nations such as Germany prefer a “top-down” approach. The UK national comprehensive approach is “top-down” but the military Road Map is “bottom-up.” Within the justice sector similar confusion is apparent:

It is often beneficial to follow the “legal track” from the bottom up to identify which systems (state and non-state) local people turn to for assistance with different issues. This can help donors understand the kind of obstacles that poor people and vulnerable groups encounter when they try to enforce their rights, and the potential provided by non-state systems for resolving these problems.¹¹³

¹¹² Helmand Rule of Law Programme Strategy 2008-2011. May 2008.

¹¹³ OECD DAC Handbook on Security Sector Reform. Supporting Security and Justice. OECD 2007, 189. <http://www.oecd.org/dataoecd/43/25/38406485.pdf> (accessed January 7 2009)

It is significant that even within nations, an agreed approach to reform is still remote, and strategies for reform should perhaps combine both approaches. The Organisation for Economic Co-Operation and Development Advisory Committee (OECD-DAC) argues that “state-centered approaches to law reform use top-down programs, which do not address the needs of the poor. Instead, the author argues for a legal empowerment service delivery approach.”¹¹⁴

State-Centric Law or Traditional Law

Within state-centric law, “state-centrism refers to a pre-occupation with states; to the exclusion of non-state actors”¹¹⁵ A state-centric approach “is one that places too much emphasis on state sovereignty in the validation and application of international legal norms.”¹¹⁶

There is a social contract between a state, its legal institutions and its people. There is little unity within some states, and particularly Afghanistan. An important question is thus whether there should be unity of justice and law within that fragmented state. Pashtun Law is similar in all Pashtunistan, whether it is in Afghanistan or Pakistan. Baluchi and Kuchi tribesmen in Afghanistan, Pakistan and Iran follow Baluchi law. In western Afghanistan, tribes follow Shia Iranian law and in the north, Uzbeks and Tajiks follow laws that transcend international boundaries into Turkmenistan and Uzbekistan. A diverse people require a diverse structure and application of law. Central to success in this area is identifying the thread to hold this diversity together whilst accepting that a

¹¹⁴ Golub, S. Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative, Carnegie Endowment for International Peace, Rule of Law series, No. 41, 2003. <http://www.carnegieendowment.org/files/wp41.pdf> (accessed November 2 2008)

national legal overarching framework is required to enforce it. Until the concept of the state has legitimacy, the law of the state will not find legitimacy. The state as a concept is alien to tribal structures. Historically the Afghan state has been synonymous with corruption, abuse, factionalism and favoritism. Partisan politics have often been linked to partisan patronage and President Karzai has excelled at this.

Central to Rule of Law is functioning justice yet the state-centric justice system has progressed slowly, hindered by corruption among judges and police. The Chief Justice of Helmand was recently removed after accepting bribes to release kidnappers and murderers.¹¹⁷ As with many other Rule of Law sectors, filling the void and establishing justice quickly is important: “The Taliban have been very effective in distributing quick local justice and we need to match that. Most Afghans depend on an informal system, so our challenge is to provide something that has all the speed of the Taliban approach but none of the excesses.”¹¹⁸

Troop Surge or Afghan Awakening Movement or a Governance Surge

The current US and Coalition focus on troop surges and troop numbers is not the answer. The recent successes in Iraq are being attributed to the General Petraeus instigated surge. However, evidence tends to suggest that success in Iraq is more the result of the Awakening Movement, coupled with an increase in special force decapitation operations against high-value targets. To repeat the surge in Afghanistan

¹¹⁵ Marks, Susan. State-Centrism, International Law, and the Anxieties of Influence. Faculty of Law. University of Cambridge, 7. <http://www.columbia.edu/cu/polisci/cspt/papers/2005/marks05.pdf> (accessed November 2 2008)

¹¹⁶ Marks, 7.

¹¹⁷ Hearst, Fraser. Grim reality of life beyond Helmand. The Sunday Times October 5, 2008 <http://www.timesonline.co.uk/tol/news/world/asia/article4882416.ece> (accessed November 2 2008)

¹¹⁸ Ibid.

based on faulty lessons learned will not increase security or help promote Rule of Law in Afghanistan. The troop surge was required in summer 2008, not in summer 2009.

A strategic plan should recognize Rule of Law and governance and the importance to it of increased security, local ownership and tribal inclusivity. The US military is considering a troop surge but UN Secretary General Ban Ki-moon has called for a political surge.¹¹⁹ In line with the political surge a development and governance surge is required. A lesson learned from conflict in Northern Ireland is that troop surges bring temporary benefits. Negotiation and diplomatic surges bring long-term benefits.

Unity of Command or Retention of Separate Commands

On October 7 2008 it was announced that all US Forces in Afghanistan would come under the command of the US COMISAF, General David D. McKiernan. The activation of US Forces-Afghanistan (USFOR-A), a functioning command and control headquarters for US forces operating in Afghanistan,¹²⁰ is a direct response to the lack of unity of command. For the first time, NATO HQ and its troops, the US Training Command of the ANA and ANP and the 20,000 US soldiers involved in the Global War on Terror will be under one commander, albeit not one command. This is a major step forward and will assist with progression of the security line of operation within the country from one leader.

¹¹⁹ Bruno, Greg. A Surge of Will in Afghanistan. Council on Foreign Relations. Daily Analysis. September 30 2008. http://www.cfr.org/publication/17399/surge_of_will_in_afghanistan.html (accessed October 6 2008)

¹²⁰ Defense Department Activates U.S. Forces-Afghanistan. U.S. Department of Defense. Office of the Assistant Secretary of Defense. (Public Affairs) News Release. Oct 6 2008 <http://www.defenselink.mil/releases/release.aspx?releaseid=12267> (accessed November 7 2008)

Chapter V. A NEW APPROACH FOR RULE OF LAW

The current Rule of Law program is fractured and disjointed and currently fails to address the Afghan Government and more importantly the peoples' Rule of Law concerns. This Chapter will outline a range of recommendations and endorse the idea for a new approach to Rule of Law for the country. This approach will not only address a range of proposals in the transitional, legal, distributive and restorative fields of justice, but also wider enterprises. It will support alternate approaches to strategy, wider policy programs, and security and development schemes. It will encourage the appointment of a super envoy to deliver the time-recognized benefits of unity of command and unity of purpose.

In Chapter Three, the UNDP analysis, recognizing the disjointed approaches to Rule of Law to date, advocated an approach focused in four separate dimensions of justice: transitional, legal, distributive and restorative. Taking this as a start-point a new approach is recommended in each area.

Transitional Justice

In Chapter Three the lack of progress in transitional justice was highlighted. Unfortunately, the progress in adopting transitional justice is complicated by President Karzai's continued strategy of appeasement regarding regional powerbrokers. His strategy continues to isolate historically strong regional powerbrokers within the government in the short-term and to restrict their ability to threaten regional and national stability. This strategy, whilst helping to protect the fledgling democracy and parliamentary system, is unraveling. The people see war criminals escape justice, whilst warlords continue to benefit financially from narcotics trading, abuse of state resources

and abuse of parliamentary position. The establishment and funding of a Reconciliation and Truth Commission to investigate past atrocities is unlikely to occur in the near term. The suspension of all government officials suspected of involvement in crimes against humanity is required but also unlikely. Widespread support from the international community for such an approach is required to enhance the status of the initiative. International support would also give reassurance to President Karzai that such an investigation would not jeopardize his government stability. Conversely, it would strengthen Rule of Law across the country and would promote government stability, particularly in the eyes of the average citizen. Widespread participatory consultation is also required to improve inclusivity in a transitional justice program.

The government should also establish a register of interests and assets for all ministers, officials and parliamentarians to increase transparency and restrict corruption.

The UNDP has now agreed in its three-year strategy 2008-2011 to facilitate transitional justice. Having secured UNDP strategic support, the government is ideally placed to seize the initiative and harness the support provided to “address past legacies of violations of human rights and humanitarian law, while also ensuring parallel capacity development of rule of law institutions.”¹²¹

In 2002 the Rome Statute of the International Criminal Court came into effect with a “permanent International Criminal Court that holds jurisdiction over crimes

¹²¹ Strengthening the Rule of Law in Conflict- and Post-Conflict Situations A Global UNDP Programme for Justice and Security. UNDP Executive Board statement Page 6. 2008-2011. http://www.undp.org/cpr/documents/Rule_of_law_global_programme_final.pdf (accessed November 11 2008)

against humanity, genocide, and war-crimes.”¹²² An investigation facilitated by UNDP and operating under the guidance of the International Criminal Court would be a powerful and bold move to address the atrocities and war-crimes committed in Afghanistan. It would be a major step in attacking the current culture of impunity.

The Afghan Human Rights Commission “found that 69 % of all Afghans were direct victims of human rights violations during the country’s decades of conflict. But importantly, the study also found that 76 % of Afghans believe that bringing human-rights abusers to justice would actually increase the country’s stability and security over the long-term.”¹²³

International acceptance that customary law has precedence in the rural and border areas is also required. A mechanism for the referral of serious crimes to Kabul would need to be established. The search for a utopian democratic Rule of Law program base on Western values and Western constitutional law should be abandoned. A more realistic and pragmatic approach to customary law should be set and agreed by the Afghan Government with International support.

International Western sensitivities to Sharia law and tribal justice mechanisms need to be set aside. The current international approach based on its own principles and values has failed to deliver justice reform. A new pragmatic approach is now required.

¹²² Transitional Justice. Penal Reform International. <http://www.penalreform.org/transitional.html> (accessed November 12 2008)

¹²³ Booker, Salih and Shaheen Rassoul. In Afghanistan It’s the Law Not the Gun that’s Most Needed. Global Rights. Partner for Justice. Washington DC. http://www.globalrights.org/site/DocServer/Afghanistan_oped_August_2006.pdf?docID=5843 (accessed November 7 2008)

Legal Justice

Rule of Law is interwoven within Afghan society through tribal, ethnic and cultural traditions. Legal justice has been established post 2001 by an AIA, an ATA and a government that has tried to simultaneously incorporate a constitution, Sharia law, Jirga (traditional informal justice) and international human-rights principles.¹²⁴ An often quoted truism is that the effectiveness of a law is determined equally by the manner in which it is applied by the government and the manner in which it is accepted by the population. It follows that legal justice is therefore more than just the establishment and agreement of national laws. It is the wider application and interpretation and acceptance of that law that are just as relevant. The government has so far been unsuccessful in delivering the legal justice required.

The current approach to Rule of Law from international organisations has to date concentrated on a mechanistic approach to law. This approach aims to correct shortcomings according to a checklist approach. This approach fits the western model in areas such as court management, court and trial procedure and drafting of law. Current legal justice reform is also focused on the national will to reform with Western NGOs and governments assuming the self-appointed mantle of “change-agent.” A number of Western donors believe the Afghans are unable to fully grasp the direction in which their judiciary should develop. There are increasing calls for the legal justice programs to become locally owned. The change agents should now be Afghans. “Trying to promote the Rule of Law by simply rewriting another country’s laws on the basis of Western

¹²⁴ Wardak, Ali. Building a post-war justice system in Afghanistan. 319. University of Glamorgan, UK Crime, Law & Social Change 41: 319–341, 2004. Kluwer Academic Publishers. http://www.usip.org/ruleoflaw/projects/wardak_article.pdf (accessed November 22 2008)

models achieves very little, given problems with laws not adapted to the local environment, the lack of capacity to implement or enforce the laws, and the lack of public understanding of them.”¹²⁵

Failed initiatives have alienated the populace, alienated the government, the ANP and members of the judiciary and the Diaspora. Civil society in post-conflict Rule of Law reform serves many purposes. It is not only a mechanism for “checks and balances.” It also serves and acts as a soundboard for new initiatives and as an opposition movement. It serves as a monitor for the government of its actions and as a critic of the application of legal and judicial initiatives. Civil society must be more integrated in the legal justice process, the reform process and the execution of justice procedure to undertake these roles.

The relationship between constitutional law and Sharia complex is difficult and undermines the speed of justice implementation. The constitution states that no law can violate Islamic principles,¹²⁶ so the primacy of constitutional law is questionable. A clear information campaign to inform the population of the legal justice system and its applicability across the country is required. The delineation of responsibilities for justice delivery between state and non-state justice needs to be more widely understood. Legal justice programs across the country need to be strengthened. Programs of training for the judiciary need to be enhanced, state legal institutional capacity improved and access to legal justice in the provinces expanded.

¹²⁵ Carothers, Thomas. Promoting Rule of Law Abroad. The Problem of Knowledge. Carnegie Endowment for International Peace, 12. Rule of Law Series Democracy and Rule of Law Project Number 34 January 2003 <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=1169> (accessed November 22 2008)

A number of Western national models for justice operate within a pluralistic legal model. This model allows religious, customary law and state law functions within a state. These models generally fall under one of two variations, a constitutional model such as that used in the US which has a hierarchical system of laws or an alternative model which allows tribal custom and religious law to develop even when at odds with national law.¹²⁷ Similarly there are differing models for structuring a courts system. The universal model states all litigation must take place in court. A second model is a court system of separate competencies e.g. family courts and religious courts. A third model is a strict separation of courts for state, custom and religion. The fourth model is one of tolerance.¹²⁸ Within Afghanistan the constitution model has been followed with support and pressure from Western nations. In terms of the court structure, Afghanistan has in theory a universal model although in practice it must tolerate each of the other three models because of a lack of capacity and judicial competency. It is unlikely that it will now revert from its constitution model, but the strengthening of legal capacity in the courts system has potential to adapt the justice system significantly in the next five years. Increased efforts to resource the non- traditional and non-state justice system, in addition to the acceptance of harsher religious law in areas favored by the people and should result in progress. A willingness by the government to allow more justice to be resolved in the religious courts and at a tribal level (i.e. in the third and fourth models) is necessary. This would demonstrate to the Islamic extremists that the national laws can meet all tribal traditions.

¹²⁶ The Constitution of Afghanistan. Article 3.

<http://www.afghansite.com/afghanistan/afghanConstitution.asp> (accessed November 2008)

¹²⁷ Jones-Pauley, Christina and Neamat Nojumi. Balancing Relations Between Society and State: Legal steps Towards National Reconciliation and Reconstruction of Afghanistan, 17. The American Society of

It would also serve as an olive branch to bring a broader representation from the Taliban into governance. Such a progressive inclusive policy may also accommodate in varying degrees the hard- line Sharia law favored in some areas of the country. Customary law persists and dominates the justice system, in spite of the government and International efforts to replace it. Acceptance of customary law in a future national justice system is probably now a necessity to allow progress in justice reform.

Distributive Justice

Distributive justice includes resolving and overcoming the root causes of conflict. Within Afghanistan there are a multitude of causes of instability. The narcotics industry, the Taliban, criminals, the Hizb-I-Islami Gulbuddin (HIG) and Al Qaeda all cause instability. So too do the regional warlords, corrupt ministers and government officials, elements of the Government of Pakistan Directorate for Inter-Services Intelligence (ISI) and foreign fighters. The narcotics industry is probably the underpinning cause of conflict and the foundation for much of the violence and interest in the instability.

A strategic decision needs to be made in Afghanistan between the need for stabilisation and development, versus the fight against insurgents and the eradication of the poppy. After 7 years there has been almost no real progress in counter narcotics programs. The Afghan crop has instead grown exponentially year on year and according to the UNODC, cannabis production increased from 2006-2007 and is now cultivated in 18 of the 34 provinces providing a new source of income to fund the insurgency.¹²⁹

Increased resources should be focused on establishing a functioning police and judicial system to defeat drug traffickers. It is still not possible to convict and imprison

Comparative Law, Inc. The American Journal of Comparative Law. Fall 2004.
http://www.usip.org/ruleoflaw/projects/comparative_law.pdf (accessed November 22 2008)

¹²⁸ Ibid.

¹²⁹ UK and UNODC Afghan Strategy Meeting Kabul. Jun 2008.

drug warlords or traffickers. The necessary building blocks of security and justice reform and provision of secure detention facilities should be a priority.

The international community has been responsible for introducing widespread bureaucracy and duplicity in institution building and Rule of Law. The Afghan Ministry of CN was established in 2004 and the US and the UK in particular have concentrated capacity building within the Independent Directorate for Local Governance, and the MOI.¹³⁰ In parallel, international donors have supported the development of a Criminal Justice Task Force specifically created to prosecute narcotics cases. To complicate the issue, the UN established a UN administered CN Trust Fund with the intention of helping the Afghan government manage the drugs problem. There is a separate Law and Order Trust Fund, a Good Performer's Initiative,¹³¹ the Afghan Reconstruction Trust Fund and a host of national, bi-lateral and EC and UN programs running concurrently.

The UK chairs CN synchronization meetings involving all embassies active in CN within country. These nations are the US, Denmark, Germany and Norway. In addition, the EU, UN, UNAMA, ISAF, DFID, USAID and UNODC attend. All follow independent strategies and funding lines yet achieve little real progress on the ground. Strategic convergence on narcotics is now required. Increased efforts are required to build, train and develop the capacity and capability of the CN Police Force (CNPF). The CNPF has the potential to be the lead security force in the fight to defeat the drug warlords. Success in this fight would reduce the cause of much of the security instability across the country.

¹³⁰ Afghanistan Counter Narcotics Script.

¹³¹ Ibid.

Restorative Justice

Restorative justice is an ancient justice system used extensively in biblical times and can be traced to ancient Celtic and Maori cultures. It is based on the concept of restoration or restitution. It is a way of righting a wrong in a manner that acceptable to a community or a family. It takes into account local culture and tribal customs.¹³²

Restorative justice programs are growing in popularity across the developed world because of the inadequacies of penal reform programs. Restorative justice is not solely related to the involvement of local people in local justice efforts or educating criminals or negotiating amnesties. It must go deeper and address local justice mechanisms, local security initiatives, and tribal and ethnic security forces. Restorative justice has been neglected to date. The recent appointment of General Petraeus to CENTCOM,¹³³ the new willingness of the US government to talk to the Taliban¹³⁴ and the consideration of border local militias similar to Pakistan tribal militia¹³⁵ are all significant. They all indicate a readiness to introduce further changes in policy and strategic direction for restorative justice initiatives. As soon as the initial elements of the tribal militia are trained and deployed, an extension of the concept utilizing tribal militia to operate across the borders of Pakistan in the Pashtun tribal areas and the FATA should be considered. In a similar manner, cross-border international tribal Shura could be encouraged to meet to facilitate improved security in the tribal border regions.

¹³² Restorative Justice Ireland Network. (Webpage removed) (accessed March 21 2008)

¹³³ Gilmore, Gerry G. Defense Department to Review Afghanistan Operations, Strategy. American Forces Press Service. Washington, Sept 24 2008. US DOD website.
<http://www.defenselink.mil/news/newsarticle.aspx?id=51295> (accessed 22 Nov 2008)

¹³⁴ US considers talks with Taliban to halt Afghanistan bloodshed. Daily Telegraph. Ben Farmer Kabul 28 October 2008. <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/3274860/US-consider-talks-with-Taliban-to-halt-bloodshed-in-Afghanistan.html> (accessed November 13 2008)

The International Community has been unable to restore or create a functioning regional and provincial justice system across the country. An inclusive, participatory and empowered restorative justice strategy is required for Kabul and the country.

Access to justice for females and juveniles has to date been limited and little progress is expected in the near future. Tribal and traditional non-state justice mechanism discriminates in Afghan society against females and juveniles and will continue to do so. The Afghan National Justice Strategy states that “justice is the vehicle through which people’s rights are realized and enforced by the state and, against the state and between private citizens. This can only be achieved when justice is the benchmark in promoting security and stability.”¹³⁶

This is contradicted by existing state and non-state practices, especially with regards to rights for women. A review of the aims and objectives of international support to justice reform and access to justice programs within the country is required. Statements in national strategies that are written for western consumption with little real national government support hinder progress. A clear objective of intentions for non-state law should be clearly laid out before the 2010 review of the national strategy.

Correspondingly, Rule of Law from a Western perspective must start to become more inclusive of restorative justice programs and initiatives. In many stable Western nations, the issue of Rule of Law is often irrelevant to many people untouched by crime or insecurity. In post-conflict countries, Rule of Law is central to peoples’ daily existence

¹³⁵ Pakistan to arm tribal militias. Washington Post. 22 October 2008.

http://www.contracostatimes.com/nationandworld/ci_10790797 (accessed November 11 2008)

¹³⁶ Justice for All. A Comprehensive Needs Analysis: Challenges and the Way Forward for the Justice Sector in Afghanistan, 20. Ministry of Justice. Government of the Islamic Republic of Afghanistan. Kabul

and future. “Compliance with law depends most heavily on the perceived fairness and legitimacy of the laws, characteristics that are not established primarily by the courts but by other means.”¹³⁷

In order to achieve this, the government will need to break the dangerous nexus between terrorism, narcotics and corruption that has consolidated in recent years. The narcotics trade provides vital resources to terrorists and armed anti-government elements, while growing corruption undermines confidence in the country's fledgling democratic institutions. All three feed on insecurity, which undermines the confidence of the people in their Government.

Whilst the creation of EUPOL can be viewed in some quarters as a positive initiative, it continues to make marginal progress and remains an embarrassing initiative due to its limited mandate and its unwillingness to face danger in the RC South region. Additionally, there continues to be no integrated, agreed national vision for policing. The continuing debate over a national centralized force versus a decentralized force utilizing Arbaki, (locally trained militia) in the form of the awakening movement is not yet resolved. Locally trained militia, acting as auxiliary policemen but operating under guidance and direction of the MOI are required. An all encompassing policing strategy, led by the US is also now required.

Security Initiatives

Notwithstanding increasing ISAF and OEF troop numbers, violence remains consistency high. The Chairman of the Joint Chiefs of Staff, Admiral Mike G. Mullen,

July 2005. <http://www.rolafghanistan.esteri.it/NR/rdonlyres/B0DB53D0-A1F9-468E-8DF0-3F485F1959A7/0/JusticeforAll.pdf> (accessed November 2 2008)

¹³⁷ Carothers, 8.

has admitted he is "not convinced we're winning it" in Afghanistan.¹³⁸ This, four months after SECDEF stated "the concept of increasing US command and control in Afghanistan is clearly something that needs to be looked at."¹³⁹

Militarily, it is more common to talk of unity of effort rather than unity of command yet the consensus way forward has to date been the military strategy. The handing over of RC West and RC South to NATO in 2005 and 2006 superficially appeared to signal a US exit strategy. It freed up the US troops to concentrate on the fighting in the East of the country and also allowed the US surge in Iraq. Unfortunately an upsurge in fighting in Helmand Province in particular and the South in general, halted all Rule of Law and security progress. Two years later there is now a growing acceptance that only unity of command of all fighting forces will allow unity of command in the establishment of Rule of Law. The two are inextricably linked and the security-development nexus has never been more apparent. "Unfortunately, American counter-insurgency efforts use the loose construct of unity of effort rather than the structure of unity of command, which is a fundamental principle of warfare."¹⁴⁰

History is full of examples of the need for a coherent counter-insurgency strategy. The strategy is not limited to integration of all aspects of reconstruction, political,

¹³⁸ Martinez, Luis. Military Brass: U.S. Running Out of Time in Afghanistan. Joint Chiefs Chairman Calls for Greater Help From Pakistan and U.S. Agencies to Fight Taliban Admiral Mike Mullen. Testimony before House Armed Services Committee. Sept. 10, 2008 . ABC News.

<http://abcnews.go.com/Politics/Vote2008/story?id=5769529&page=1> (accessed November 7 2008)

¹³⁹ Gates, Robert M. Afghanistan Command Restructuring Worthy of Consideration. Texarkana, Texas, May 2, 2008 By Donna Miles American Forces Press Service

<http://www.defenselink.mil/news/newsarticle.aspx?id=49769> (accessed September 18 2008)

¹⁴⁰ Nuzman, Henry. The Structure of Unity of Command. Office of the Under Secretary of Defense for Policy, Special Operations, and Low-Intensity Conflict (SOLIC).

http://www.jhuapl.edu/urw_symposium/proceedings/2008/Authors/Nuzum.pdf (accessed September 18 2008)

military, economic and social and governance. It must also establish a headquarters or organization empowered to implement it. The situation now requires a leader to do it.

The requirement for authority and strategy in one overarching organisation was echoed recently in a UK debate on the country. In the House of Commons in May 2008, the Rt Hon Adam Holloway MP stated: “The way we have executed this operation has been incompetent and half-cocked. The lessons of history tell us that we need unity of command... we need an overarching boss to be in charge.”¹⁴¹

Security initiatives should not be restricted to Afghanistan’s borders. Cross-border security initiatives are also required. They require international support and the assistance from neighboring governments, particularly Pakistan and Iran.

Additional Initiatives

Accepting that a new approach for Rule of Law is required implies a fundamental review of current practices and consideration of wide ranging alternative initiatives. A number of additional proposals for consideration are outlined below.

Obstacles to progress in SSR apply across the Rule of Law sector. The problems of complexity, expertise, capacity, resistance to change and insecurity¹⁴² all require addressing.

The competition for influence and resources and position in a post-conflict environment amongst nations, international organizations’ and NGOs is often fierce and usually often detrimental to progress. Within Afghanistan there has also been widespread

¹⁴¹ Hansard, Westminster Hall, Tuesday 17 Jun 2008. David Taylor in the Chair. Helmand Province. Column 175WH

¹⁴² Nathan, Laurie. Security Sector Reform. Reform in New Democracies, 23. Bonn International Centre for Conversion. Brief 15. Jun 200. http://iecpp.org/download/cdi/13seg_ostaculos_ref_sector_seguridad.pdf (accessed November 22 2008)

internal competition within organizations and particularly within the UN. UN departments are competing with each other for resources rather than working as “One United Nations.”¹⁴³ Progress to end duplication of effort and conflicting aims for personal benefit must start in the UN and UNAMA in particular. UNAMA must accept and display more leadership in Afghanistan to ensure progress in the Rule of Law. The UNDP has recently and belatedly issued its priorities. “Strengthening the Rule of Law within an early recovery framework and during transitions, addressing women’s security and access to justice, supporting capacity development of Rule of Law institutions, facilitating transitional justice and promoting confidence building and reconciliation.”¹⁴⁴ This is a welcome development but requires action now to ensure its success.

The ANDS outlines the Afghan perception of where it requires its country to be and sets out national strategy. All national and international strategies are supposed to nest within the ANDS. This does not occur in all cases and the conflict between the strategies allows plans to fail. Any western unwillingness to follow Afghan direction needs to be addressed. Where national interests are at odds with Afghanistan’s, the UN or a Super Envoy needs the authority to close down national programs.

Rule of Law is promoted internationally to primarily aid development and further democratization. Aid agencies and NGOs often promote the need for Rule of Law as necessary for foreign investment and economic development. This is not the case with all investors. China and Russia both look on inward investment to a country based on

¹⁴³ “Thematic Evaluation Volume 1,” v.

¹⁴⁴ Strengthening the Rule of Law in Conflict- and Post-Conflict Situations. A Global UNDP Programme for Justice and Security, 6. UNDP Executive Board statement.

http://www.undp.org/cpr/documents/Rule_of_law_global_programme_final.pdf (accessed November 11 2008)

expected returns rather than any notion of democracy. It is international aid agencies, governments and NGOs who link assistance and aid to Rule of Law reform. This forces Western reform concepts onto people with little choice but to accept. The linkage of aid to Western concepts of progress should be discontinued. Additionally, the international community must commit to greater aid effectiveness and improved coordination, which are vital to sustained economic growth and improved security.¹⁴⁵

The current international approach to Rule of Law continues to support the creation of single sub-sector strategies without an overarching strategic framework. The CN strategy is written, the policing vision is under construction but there is no single Rule of Law strategy that can guide all national, international and military strategies.

Closer involvement of Diasporas can have major benefits. Participation in drafting legislation, review of Western policy approaches and inclusion in policy think tanks is recommended. They are also useful in advising on rebuilding state institutions, creating regional legal infrastructure and assisting with personnel selection. Locally based power-brokers within Afghanistan are more likely to be receptive to Afghan Diaspora inclusive legislation and ROL initiatives.¹⁴⁶

The expansion of stabilisation units like the UK Security Sector Defense Advisory Team (SSDAT), the UK Afghan Drugs Inter- Departmental Unit (ADIDU), the UK Stabilisation Unit and S/CRS is recommended. Similarly there needs to be recognition that deployable reserve forces are not the answer. Professional civilian deployable experts working through a stabilisation unit is required. They are critical to

¹⁴⁵ International Conference in Support of Afghanistan. UNAMA, 15. Paris, 24 May- 4 June 2008. http://www.ands.gov.af/ands/Provincial_Consultations/details.asp?id=101 (accessed November 11 2008)

nation building and SSR activities. The establishment of a new Military Reconstruction Corp is one way forward, staffed with Rule of Law and SSR specialists.

Enhanced pay and allowances and retainers for civilian Rule of Law specialists on call to assist in programs in line with national objectives should be considered. The U.S. Department of State is currently developing a Civilian Response Corps with expeditionary capability in coordination with seven other U.S. Government departments. It is proposed that this new initiative will see the Civilian Response Corp working in a joint multi-agency capacity with the military, the UN and other agencies in the field. The Corp will deal in particular with transitional justice, security and Rule of Law.¹⁴⁷ There is also a requirement for closer involvement of academia in policy creation and the requirement for civilian think tanks to deploy as key advisors to multinational commanders and as advisors to these new civilian response units.

Reform must be visible, consistent, resourced and locally owned. It is preferable for the adoption of a relations-based versus rules-based approach to governance and accountability¹⁴⁸

The United Nations Development Program (UNDP) Strategic Plan 2008 - 2011, (Rule of Law and Access to Justice) states its main focus to 2001 is “strengthening the Rule of Law within an early recovery framework and during transitions, addressing women’s security and access to justice, supporting capacity development of rule of law

¹⁴⁶ Hansen, Peter. Fragile Situations. Diasporas and Fragile States. Danish Institute for International Affairs Policy Brief. Research Unit on Migration. October 2008. www.diiis.dk/pha (accessed November 11 2008)

¹⁴⁷ Erdosy, Joshua M. Transitional Justice and Rule of Law and the Creation of the Civilian Response Corps U.S. Government Expeditionary Capacity. International Network to Promote the Rule of Law. (INPROL) 24 November 2008 <http://www.inprol.org/node/4086> (accessed December 4 2008)

¹⁴⁸ Boesen, Nils. Informal Institutions How Social Norms Help or Hinder Development. OECD DAC October 2007 Chapter 4: Governance and Accountability: ISBN 978-92-64-03906-3

institutions. Facilitating transitional justice and promoting confidence building and reconciliation.”¹⁴⁹

A recent study¹⁵⁰ on implementing the Rule of Law in Liberia demonstrates that the problems faced in Afghanistan are in no way unique. The study proposes a concentration on integrated planning and coherence, a need to look beyond short-term goals and the danger of overly legalistic and technical law. It proposes wider use of community policy, an acceptance of people-centered justice versus state-centered justice and the need to view Rule of Law within a development concept. Furthermore it identified how a Liberian Rule of Law Task Force became the centre of focus for all SSR and was given national support by the President. Similar progress and a similar end-state is the goal for Afghanistan.

The establishment of effective and efficient Rule of Law is a huge task. The task is complicated because of competing definitions and debate over the legal models required for a moderate Islamic Society. The reform and rebuilding of institutions, the building of capacity in every area of the state justice system, the ending of corruption, and training of legal staff are all important. There is no easy fix, and no template of success to follow. It is vital that there is closer understanding of the security-stability nexus and its impact on Rule of Law. There can be no widespread or wide-scale improvement in Rule of Law without security. There can be no security without the Rule of Law. The mix of short-term and long-term projects and understanding their

http://www.oecd.org/document/19/0,3343,en_2649_33935_39471507_1_1_1_1,00.html (accessed November 22 2008)

¹⁴⁹ “UNAMA International Conference in Support of Afghanistan.” 15.

¹⁵⁰ Blume, 2.

interdependencies to create an effective Rule of Law program will confound the international community and the Afghan government for many years to come.

A new Rule of Law approach is therefore required for Afghanistan. It must meet the four dimensions of justice (distributive, transitional, traditional and, restorative. It must be joint, integrated, coordinated, multinational and multi-agency. It must be people and state-centered, incorporate ‘top down’ and ‘bottom up’ initiatives and include state and traditional security forces. It must acknowledge customary and state justice and above all it must be perceived to be fair by the people, and led by the people.

In 2000 Brahimi set out the need for the UN to change in its approach to peacekeeping. The challenge he outlined in 2000 for peacekeeping remains just as valid today for Rule of Law in Afghanistan:

*“It is now widely accepted that present-day conflicts have many dimensions that must be addressed comprehensively and require more integrated and coordinated action. [...] an integrated approach is particularly important in the field.”*¹⁵¹

¹⁵¹ Report of the Panel on United Nations Peace Operations (Brahimi Report). New York: United Nations. A/55/305-S/2000/809 (accessed 21 August 2008).
http://www.un.org/peace/reports/peace_operations/docs/full_report.htm (accessed November 23 2008)

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ABBREVIATIONS

| | |
|---------|--|
| ADIDU | Afghan Drugs Interdepartmental Unit |
| AFNORTH | Allied Force Headquarters North |
| AIHRC | Afghan Independent Human Rights Commission |
| ANA | Afghan National Army |
| ANDF | Afghan National Development Framework |
| ANP | Afghan National Police |
| ANSF | Afghan National Security Forces |
| ARRC | Allied Rapid Reaction Corp |
| ATA | Afghan Transitional Authority |
| CENTCOM | Central Command |
| CN | Counter Narcotics |
| CNPF | Counter Narcotics Police Force |
| COMISAF | Commander ISAF |
| CSTC-A | Combined Security Transition Command Afghanistan |
| DDR | Disarmament, Demobilization and Reintegration |
| DFID | Department for International Development |
| DOD | Department of Defense |
| DPKO | Department of Peace Keeping Operations |
| EU | European Union |
| EUPOL | European Policing |
| FATA | Federally Administered Tribal Area |
| FCO | Foreign and Commonwealth Office |

| | |
|----------|--|
| GAO | General Accounting Office |
| HIG | Hizb-I Islami Gulbuddin |
| IAA | Interim Afghan Authority |
| I-ANDS | Interim Afghan National Development Strategy |
| IMF | Investment Management Framework |
| ISAF | International Security Assistance Force |
| ISI | Inter-Services Intelligence |
| JFC | Joint Force Command |
| MOD | Ministry of Defense |
| MOI | Ministry of the Interior |
| NATO | North Atlantic Treaty Organisation |
| NDS | National Directorate of Security |
| NGO | Non Governmental Organization |
| OECD-DAC | Organisation for Economic Co-ordination and Development- Development Assistance Committee |
| OEF | Operation enduring Freedom |
| OMLT | Operational Mentoring and Liaison Team |
| OPLAN | Operational Plan |
| OROLSI | Office of Rule of Law and Security Institute |
| PRT | Provincial Reconstruction Team |
| RC | Regional Command |
| S/CRS | Office of the Coordinator for Reconstruction and Stabilization |
| SCR | Senior Civilian Representative |

| | |
|---------|---|
| SECDEF | Secretary of Defense |
| SHAPE | Supreme Headquarters Allied Powers Europe |
| SSDAT | Security Sector Defense Advisory Team |
| SSR | Security Sector Reform |
| UNAMA | United Nations Assistance Mission Afghanistan |
| UNODC | United Nations Office on Drugs and Crime |
| USFOR-A | US Forces Afghanistan |

VITA

Lt Col Sean M Burke MBE R IRISH is an Infantry Officer and was commissioned into the British Army in 1987. He has served in the UK, West Germany, The Netherlands, Northern Ireland, The Falkland Islands, Iraq, Afghanistan, and USA. He has had a number of assignments within an Infantry Battalion including Mortar Platoon Commander, Adjutant, Rifle Company Commander and Battalion Second in Command. His last Infantry assignment was Commanding Officer 3rd Battalion the Royal Irish Regiment in Armagh, Northern Ireland in 2008. He was Chief Instructor at the Royal Military Academy Sandhurst and previously held a Chief of Staff appointment in the Defence Procurement Agency. He has held 5 NATO appointments in the Netherlands, Germany, Iraq and Afghanistan. He has a BA (Hons) in Housing, a Post Graduate Certificate in Security Sector Management, a Masters in Defence Administration (MDA) and a MA in Military Studies.